

CONTENTS
CHAPTER 752. DISCIPLINARY AND ADVERSE ACTIONS

SECTION A. GENERAL,

PARAGRAPH	PAGE
1. Scope	A-1
2. References.....	A-1
3. Policy	A-1
4. Definitions.....	A-2
5. Responsibilities.....	A-4
6. Official Authorized to Propose and Decide Actions.....	A-5
7. Determining the Facts.....	A-6
a. Inquiry and Investigation.....	A-6
b. Status of Employee Pending Inquiry or Investigation.....	A-7
c. Evidence File	A-8
d. VA Beneficiary Records	A-8
e. Official Investigation Reports or Official Inquiries	A-8
8. Determining Appropriate Action.....	A-9
a. General	A-9
b. Substance Abuse/Medical Considerations.....	A-9
c. Non-Disciplinary Reasons Resulting in Removal, or Reduction in Grade or Pay	A-12
d. Reductions in Grade or Pay, or removal, or Reduction in Grade or Pay	A-13
e. Involuntary Leave	A-13
f. Indefinite Suspension.....	A-13
g. Progressive Discipline.....	A-13

SECTION B. DISCIPLINARY ACTIONS

1. Admonishment	B-1
a. Definition.....	B-1
b. Procedure	B-1
c. Withdrawal of Admonishment.....	B-1
d. Right to File a Grievance	B-2
2. Reprimand.....	B-2
a. Definition.....	B-2
b. Procedure	B-2
c. Withdrawal of Reprimand.....	B-2
d. Right to File a Grievance	B-3
3. Disciplinary Suspension for 14 Calendar Days or Less	B-3
a. Actions Covered	B-3
b. Employees Covered	B-3
c. Employee Entitlements.....	B-3
d. Procedures.....	B-4

SECTION C. ADVERSE ACTIONS

- 1. Actions Covered C-1
- 2. Employees Covered..... C-1
- 3. Employees Excluded C-1
- 4. Actions Excluded C-2
- 5. Types of Adverse Actions C-3
- 6. Burden of Proof During Appeal Process C-4
- 7. Employee Entitlements C-4
- 8. Exceptions to 30 Days Advance Notice C-5
- 9. Notice of Proposed Action C-5
- 10. Status of Employee During Advance Notice Period of Adverse Action C-8
- 11. Employee's Reply C-8
- 12. Arriving at Final Decision on the Proposed Adverse Action C-10
- 13. Decision Notice C-11
- 14. Adverse Actions Relating to the Crime Provision..... C-12
- 15. Adverse Actions in the Senior Executive Service C-14
- 16. Records C-15

APPENDIXES

- A. Sample Letters..... App. A-1
- B. Grievance and Appeal Rights App. B-1
- C. Firm Choice, Last Chance, and Abeyance Agreements App C-1
- D. Table of Examples of Offenses and Penalties App D-1

Figures

<u>No.</u>	<u>Page</u>
1 Sample Admonishment	App A-3
2 Sample Reprimand	App. A-5
3 Sample Notice of Proposed Removal for Disciplinary Reasons (Applicable for other adverse actions and suspensions of 14 days or less)	App. A-9
4 Sample Decision Letter (Suspension for 14 Calendar Days or Less for Disciplinary Reasons)	App. A-11
5 Sample Decision Letter (Removal, demotion, suspension of more than 14 days, and other adverse actions)	App. A-13
6 Sample Proposed Indefinite Suspension (Invoking the "Crime Provision")..	App. A-17
7 Sample Decision Letter (Indefinite Suspension)	App. A-21

CHAPTER 752. DISCIPLINE AND ADVERSE ACTIONS
SECTION A. GENERAL

1. SCOPE

This chapter contains the policy for taking disciplinary and adverse actions in the Department of Veterans Affairs (VA). Unless otherwise indicated, the chapter applies to all VA employees appointed under title 5 U.S.C., and under title 38 U.S.C., sections 7401(2) and (3).

2. REFERENCES. Title 5 U.S.C. chapters 73 and 75; MP-5, Part 1, Chapter 351, Reduction in Force; 6 CFR part 752; MP-5, Part 1, Chapter 792, Health Services; and 38 U.S.C. 7401(2) and (3).

3. POLICY

a. The public interest requires the maintenance of high standards of employee integrity, conduct, effectiveness, and service to the public. When such standards are not met, it is essential that prompt and just corrective action be taken. The policy of VA is to maintain standards of conduct and efficiency that will promote the best interests of the service. Disciplinary and adverse actions shall be governed by these basic principles:

(1) An employee shall be informed in writing honestly and specifically why the action is being brought against him or her.

(2) An employee shall be given a reasonable opportunity to present his or her side of the case.

(3) The employee and representative shall have assurance of freedom from restraint, interference, coercion, discrimination, or reprisal in discussing, preparing, and presenting a defense.

b. In taking actions covered by this chapter, like penalties will generally be imposed for like offenses (see app. D for further discussion). However, supervisors should give consideration to several factors when determining what action is appropriate, including the nature and gravity of the offense, the existence of either mitigating or aggravating circumstances, the frequency of the offense, and the employee's position. Adverse actions against employees (excluding employees in the Senior Executive Service (SES)) will be taken only for such cause as will promote the efficiency of the service. Adverse actions against SES employees will be based only on misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function.

c. The adverse action procedures described in this chapter will be used for all actions defined as an adverse action in and covered under 5 CFR Part 752.

d. An action covered under this chapter must be in conformance with the merit system principles in 5 U.S.C. 2301 and must not be based on any of the prohibited personnel practices listed in 5 U.S.C. 2302. Accordingly, actions covered under this chapter may not be based on prohibited discrimination because of race, color, religion, sex, national origin, age, or disability. Except when required by statute, an action covered under this chapter must not be taken against an employee because of marital status or partisan political reasons. Actions covered under this chapter must not be taken as reprisal for the proper exercise of an employee's legal or administrative appeal rights. The Whistleblower Protection Act of 1989 (Public Law No. 101 - 12) specifically affords protections and entitlements to employees who allege reprisal for having engaged in whistleblowing activities.

e. Any applicable provisions of a negotiated labor-management agreement should be consulted to determine the possible effect on the processing of disciplinary/adverse actions, notices of such actions, and employee rights.

f. Any VA employee may review this chapter and related material by contacting the Human Resources Management Office.

4. DEFINITIONS

a. **Grade.** A numerical level assigned to a position under a position classification or job grading system.

b. **Pay.** The rate of basic pay fixed by law or administrative action for the position held by an employee.

c. **Day.** Day means calendar day.

d. **Active duty status.** Pay status including authorized overtime, holiday pay, or premium pay.

e. **Disciplinary Action.** An action taken to correct misconduct or other offenses and to enforce prescribed rules of behavior. It includes admonishments, reprimands, and suspensions of 14 days or less.

f. **Adverse Action.** A removal, separation for disability, suspension for more than 14 days, furlough for 30 days (22 non-continuous days) or less, or reduction in grade or pay effected by management for either disciplinary or non-disciplinary reasons, except for those actions which are excluded by law or regulation (see 5 CFR, pt, 752).

g. **Proposing Official.** The management official who issues a notice of proposed disciplinary or adverse action (i.e., any proposed suspension, removal, reduction in grade or pay, or furlough for 30 days or less),

h. **Deciding Official.** The management official designated to make the final decision on a disciplinary or adverse action.

i. **Furlough.** The placing of an employee in a temporary status without duties and pay due to lack of work or funds, or other non-disciplinary reasons.

j. **Official Time.** Time granted to an employee to review the material relied on to support a proposed action, to prepare an answer, and to secure affidavits, If the employee is otherwise in a duty status.

k. **Notice Period.** The period of time that begins the day after the date an employee receives a written proposal of a disciplinary or adverse action and which ends on the effective date of the action, if effected.

l. **Reduction in Grade.** An employee is moved to a position of lower grade under the general schedule system or Federal wage system.

m. **Reduction in Pay.** An employee's rate of basic pay is reduced involuntarily, that is, not requested by the employee for personal reasons or benefit. Reduction in pay does not include the involuntary loss of any differentials such as standby pay, night work, overtime, hazardous duty, or holiday pay,

n. **Suspension.** The placement of an employee, for disciplinary reasons, in a temporary status without duties and pay,

o. **Indefinite Suspension.** The placement of an employee in a non-duty, non-pay status for a temporary period of time pending investigation, inquiry, or further agency action.

p. **Removal.** The involuntary separation of a non-probationary employee for disciplinary or non-disciplinary reasons,

q. **Individual with a Disability.** One who (1) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) has a record of such Impairment, or (3) is regarded as having such an impairment (29 CFR 1614,203).

r. **Qualified Individual with a Disability.** With respect to employment, an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the position in question without endangering the health and safety of the individual or others and who, depending upon the type of appointing authority being used, (1) meets the experience and/or education requirements of the position or (2) meets the criteria for appointment under one of the special appointing authorities for people with disabilities.

s. **Paid Non-Duty Status.** Compensating an employee while not on duty.

5. RESPONSIBILITIES

a. Administration heads, Assistant Secretaries, other key officials, and Deputy Assistant Secretaries, and field facility Directors are responsible for:

(1) Administering policy concerning disciplinary and adverse actions in conformance with requirements of this chapter and any applicable labor-management agreements; and reviewing existing policies and recommending appropriate changes.

(2) Delegating to supervisors appropriate authority for the direction and discipline of employees under their jurisdiction and assuring proper supervisory training.

(3) Ensuring that supervisors properly exercise their disciplinary authority.

(4) Ensuring that appropriate mechanisms are in place to inform employees of VA policy concerning disciplinary and adverse actions and where this chapter may be reviewed.

b. The Deputy Assistant Secretary for Human Resources Management is responsible for:

(1) Developing departmental disciplinary and adverse action policy.

(2) Providing technical advice and guidance to management officials and field station personnel officials.

c. Supervisors are responsible for:

(1) Gathering and analyzing the facts concerning each possible disciplinary or adverse action and documenting these facts.

(2) Initiating appropriate and timely disciplinary or adverse actions.

d. The Human Resources Management Officer is responsible for:

(1) Assisting supervisors and management officials at all levels with disciplinary and adverse action matters; interpreting regulations and statutes; recommending sound human resources management practices; reviewing existing policies and procedures and recommending appropriate changes.

(2) Reviewing disciplinary and adverse actions prior to issuance to ensure compliance with existing laws and regulations and advising the decision official as necessary.

(3) Advising employees and answering their questions regarding their rights in disciplinary and adverse action matters, and providing guidance on interpretations of disciplinary and adverse action procedures, regulations and statutes.

(4) Ensuring that all employees are made aware of VA standards of ethical conduct and related responsibilities as well as other laws, rules, and regulations governing VA expectations of acceptable conduct.

e. Employees are responsible for:

(1) Meeting standards of conduct as required by laws, rules, regulations, and policies.

(2) Obtaining advice from authoritative agency officials (supervisors, Human Resources Management Officers, District Counsels, etc.) on any unclear or questionable rules of conduct before engaging in the conduct.

6. OFFICIALS AUTHORIZED TO PROPOSE AND DECIDE ACTIONS

a. Administration heads, Assistant Secretaries, other key officials, and Deputy Assistant Secretaries, and field facility Directors, as appropriate, are responsible for designating in writing management officials who may propose and decide actions covered in this chapter, and for ensuring that supervisory employees under their jurisdiction are made aware of such designations.

b. Authority. Officials who may issue admonishments and reprimands, and propose and decide suspensions of 14 calendar days or less, and adverse actions will be as follows:

(1) Admonishment. The official who may issue a letter of admonishment will normally be the employee's immediate supervisor or in the supervisory line.

(2) Reprimand. The official who may issue a letter of reprimand to an employee must be at the division or service chief level in a field station, or at the division chief level or above in Central Office.

(3) Suspension of 14 Calendar Days or Less. The official who may issue a letter of proposed suspension of 14 calendar days or less to an employee must be at the division or service chief level or above in a field station, or at the division chief level or above in Central Office. A final decision on a proposed suspension of 14 calendar days or less will be made by the proposing official, or an official at any level in the supervisory line above the official who proposed the action. The Secretary or designee retains the authority to make the final decision on the suspension of employees occupying positions centralized to the Secretary.

(4) Furloughs. MP-5, part 1, chapter 351 identifies officials who may propose and decide furloughs.

(5) Adverse Action.

(a) Proposed Adverse Actions. The official who may issue a letter of proposed adverse action to an employee must be at the division or service chief level or above in a field station, or at the division chief level or above in Central Office.

(b) Decisions on Adverse Actions. The official who may issue a letter of decision must be at the Director level in a field station or at the service director level or above in Central Office. The Secretary or designee retains the authority to make the final decision on adverse actions involving employees occupying positions centralized to the Secretary,

c. Actions resulting from a Central Office investigation, with the exception of those conducted by the Office of Inspector General (OIG), will be proposed and decided by officials in Central Office. Such authority may be delegated on a case by case basis to the field facility director. Actions based on OIG investigations may be taken at the field station level in coordination with the appropriate organizational elements in Central Office.

d. Consistent with the restrictions provided in subparagraphs b and c above, field facility directors are responsible for designating officials who may propose and/or decide disciplinary and adverse actions involving employees in the field occupying non-centralized positions. Administration heads, Assistant Secretaries, other key officials, Deputy Assistant Secretaries, and field facility Directors are responsible for designating officials who may propose and/or decide disciplinary and adverse actions involving:

(1) employees under their jurisdiction occupying positions centralized to the Secretary (except final decisions on suspensions of 14 calendar days or less and adverse actions);

(2) employees under their jurisdiction occupying positions centralized to an Administration head or Assistant Secretary;

(3) employees in Central Office under their respective jurisdictions; and,

(4) employees in the field who are not under the supervision of a field facility director.

7. DETERMINING THE FACTS

a. Inquiry and Investigation

(1) In cases involving a potential disciplinary or adverse action, inquiry will be made into the incident or situation as soon as possible to obtain the facts and determine what action, if any, is warranted. Except in very rare or unusual circumstances, if the employee desires a representative, the investigator will wait a reasonable period of time before proceeding. Ordinarily, a preliminary inquiry will be made by the appropriate line supervisor. A further investigation may be warranted depending on the nature and seriousness of the incident. Information concerning the matter will be sought from the employee who is alleged to have committed the offense and from any other persons who may have pertinent information about the case. The resulting information will be documented. Signed statements, preferably under oath, are the best form of documentation and should be obtained, when possible, from employees interviewed. The authority to take sworn statements must be exercised in accordance with 38 U.S.C. 5711 and its implementing regulations. However, failure to obtain a statement from the employee involved will not, in and of

itself, serve to void the action, particularly where sufficient information is otherwise obtained from the employee, or the nature of the situation makes it impractical or unnecessary to obtain a written statement. Information will be developed impartially and an effort will be made to resolve conflicting statements by developing additional evidence. Material which cannot be disclosed to the employee or to his or her representative, may not be used to support a disciplinary or adverse action.

(2) All employees are required to provide full and truthful answers during any inquiry or investigation. Failure to do so may be grounds for disciplinary or adverse action. The only time employees are entitled to remain silent is if they may potentially incriminate themselves in a criminal offense. Employees claiming such a right must state this as their reason in order for the right to apply. The assistance of the Regional Counsel or General Counsel, as appropriate, will be obtained in determining whether immunity from prosecution may be granted. Immunity and the extent of immunity will be reduced to writing and provided to the employee. (Also see subparagraph e. below.)

b. Status of Employee Pending inquiry or investigation

(1) Duty Status. Ordinarily, the employee will be retained in a pay and active duty status in his or her position at current grade and salary during any inquiry or investigation.

(2) Detail, Leave or Paid Non-Duty Status. In those instances where it is determined that the employee's continued presence at his or her worksite during an inquiry or investigation might pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the following alternatives may be considered:

(a) Detailing the employee to other duties where he or she is no longer a threat to safety, to VA's mission, or to Government property;

(b) Allowing the employee to take leave, (annual, sick, leave without pay), or carrying him or her in an absent without leave status if the employee has absented himself or herself from the work-site without requesting leave);

(c) As a last resort, placing the employee in a paid non-duty status pending completion of the inquiry or investigation. Although Civil Service regulations grant agencies the authority to place employees in a non-duty status with pay during the advance notice period of a proposed removal under the limited circumstances described in this paragraph, these regulations do not address the status of an employee during a period of inquiry or investigation or during the notice period of a proposed indefinite suspension. In those instances where management determines that an employee's continued presence at the worksite might pose a threat to the employee or others, result in loss of, or damage to, Government property, or be injurious to some other legitimate Government interest, or when a proposed indefinite suspension is issued in conjunction with the crime provision, managers may place the employee in a brief period of non-duty status with pay for the period of time necessary to conduct an inquiry or investigation and prepare charges,

including the advance notice of a proposed indefinite suspension. Care should be taken to ensure that this is for the shortest practicable period.

(3) Indefinite Suspension. (See par. 8f of this sec.)

c. Evidence File. If a proposed adverse action is contemplated, an evidence file must be established before the notice is issued to the employee. The file must contain all available evidence upon which the notice of proposed action is based, and which supports the reasons in that notice (including records of past disciplinary action and related material, if such a record forms part of the basis for the action proposed). It must also include any written summary of employee's oral reply and/or employee's written reply. Normally the evidence file will contain an index for easier reference to documents. Additional evidence acquired after the issuance of a proposed adverse action notice may be added without necessitating re-issuance of the notice unless the additional evidence forms the basis for initiating new reasons for proposing the action. However, the employee must be provided with copies of any material when it is added to the evidence file. Any use or disclosure of a record or information must comply with legal requirements for disclosure.

d. VA Beneficiary Records. The assistance of the Regional Counsel or General Counsel, as appropriate, should be obtained when questions arise concerning the use of VA beneficiary records in taking an action covered under this chapter. Specifically, the use of VA beneficiary records must be in accordance with the guidelines of confidentiality provided in 38 U.S.C. 5701, 5705, and 7332; and the Privacy Act at 5 U.S.C. 552a.

e. Official Investigation Reports or Official Inquiries

(1) It is not necessary for a supervisor or other appropriate official to inquire into an incident in accordance with the above instructions where sufficient information is available from other official sources. These sources include, but are not limited to: reports of a Central Office or Office of the Inspector General investigation, reports of a field examination conducted by a representative of the Office of Regional Counsel, or other official investigations conducted under the authority of MP-I, part 1, chapter 2. Where the information appears to be inadequate, the Human Resources Management Officer should be consulted concerning the necessity for the development of additional information. The same principle also applies to official investigations of other government agencies, whether Federal, state or local, if the agency allows the use of the investigation, or part of it, or extracts from it. In cases involving criminal matters, it is the policy of VA to cooperate with appropriate law enforcement agencies. In obtaining evidence and/or coordinating such matters, the assistance of the Regional Counsel or General Counsel, as appropriate, should be obtained.

(2) When management relies on facts developed from an official investigation or other official inquiry to support a proposed adverse action, only the information relied upon will be included in the evidence file. When using official information, care must be exercised to extract only that information which is being relied on to support the reasons in a proposed adverse action.

(3) Title 38 CFR part 17 defines the VA Medical Quality Assurance Program, and the Health Services Review Organization (HSRO), and provides confidentiality for certain quality assurance records and documents. Documents and records generated through these programs cannot be used as evidence to support taking a disciplinary or adverse action. However, information which led to a quality assurance investigation can also lead to the initiation of a separate, independent investigation. Evidence developed as a result of such independent investigation can be used in a disciplinary or adverse action. The assistance of the Regional Counsel or General Counsel, as appropriate, should be obtained when questions arise concerning the confidentiality of Quality Assurance and HSRO documents and whether such documents are covered by the provisions of 38 CFR Part 17, or can be used as evidence in a disciplinary or adverse action.

8. DETERMINING APPROPRIATE ACTION

a. General. After determining the facts in a case, the responsible official authorized to initiate action should consult the table of offenses and penalties contained in appendix D of this chapter. Any extenuating or mitigating circumstances or other contributing factors which may have some bearing on the situation, including past record, should be considered in determining the action to be taken. The initiating official will consult with the Human Resources Management Officer regarding the propriety of the disciplinary or adverse action being considered,

b Substance Abuse/Medical Considerations

(1) In relating alcoholism and drug abuse problems to disciplinary policies and practices, it is important to consider non-disciplinary procedures aimed at rehabilitation. However, if the employee refuses to accept assistance offered through the program or to otherwise correct performance, disciplinary measures will be invoked on the basis of the specific misconduct of the employee,

(2) In offering rehabilitative assistance, the employee's supervisor need not confront the employee with the supervisor's belief that the employee has a drinking or drug abuse problem, The supervisor must make the employee aware in general terms that a problem exists affecting his/her conduct, and recommend that the employee participate in a rehabilitation program that is available. Casual suggestions to the employee that the Department would be willing to assist the employee with any problems he/she may have are not a sufficient attempt at counseling to constitute reasonable accommodation. The counseling must be specific with the supervisor recommending that the employee participate in a rehabilitation or counseling program, Should the employee ignore the offer of assistance and the performance or conduct problem continues, It may be necessary to give the employee a "firm choice", between accepting treatment or facing the consequences. A sample firm choice letter is contained at appendix C. This letter should be modified to suit your particular circumstances.

(3) Referrals under the Employee Assistance Program (EAP) should be made in writing and as early as possible when the supervisor has a conduct or performance related reason to believe the employee has an alcohol or drug abuse problem which is causing the deficiencies. Written

documentation should be maintained of any meetings between the supervisor and the employee to show that an offer of assistance was made. Copies of such documentation should be given to the employee. This documentation can be included at a later date in the evidence file used to support an adverse action. If the employee rejects the offer of assistance, and refuses to acknowledge the problem, action based on misconduct may be taken, including possible removal, even though the employee may later attribute the misconduct to an alcohol or drug problem.

(4) There may be situations where a meaningful offer of assistance is not possible, and appropriate action such as a proposed removal is required. Examples include situations where an employee is incarcerated for an extended period of time, or where the act of misconduct is so egregious (e.g., patient abuse) as to require that the employee be removed immediately from duty status during the period of an investigation and any subsequent proposed adverse action. Normally, an employee will be maintained in a paid duty status during the period between proposal and decision letters. There are circumstances as outlined in law or governing government-wide regulations that allow management to make exception to this provision. In such instances, management must be prepared to demonstrate before a third party that accommodating the employee would have imposed an undue hardship upon the facility where the employee works.

(5) Continuing misconduct while an employee is participating in the program may be dealt with by taking appropriate disciplinary or adverse action. However, the length of time in the program, the type of rehabilitation program provided to the employee, and the employee's demonstrable progress in treatment will be considered as possible mitigating or aggravating factors when deciding on the appropriate action.

(6) When an employee raises the issue of an alcohol or drug related problem as an affirmative defense at the point when a formal adverse action has been proposed, management must consider its reasonable accommodation requirements before acting on the proposal. However, if the action is effected, management should be prepared to demonstrate (as appropriate) during any third party review that:

(a) The employee has never raised the issue until receipt of the notice of proposed action, and has failed to prove the existence of a substance abuse problem;

(b) There is no nexus (or connection) between the employee's alcohol or drug problem and the specific incident(s) or reasons on which the proposed action is based;

(c) The employee has refused previous offers of rehabilitative assistance;

(d) The employee's conduct and/or performance has failed to improve despite previous participation in the EAP;

(e) Efforts to reasonably accommodate the employee would impose an undue hardship on the operation of the Department; or,

(f) The employee does not meet the regulatory criteria of an employee with a disability.

(7) If management has any reason to believe that the employee's claim may be a pretext to delay a proposed adverse action, it may request documentation to show the presence of an alcohol or drug dependence problem. The documentation must consist of expert evidence on the existence of a substance abuse problem at the time of the misconduct, and may include:

(a) Objective clinical findings such as test results and observation of physical signs;

(b) Medical diagnoses based on evaluation; or

(c) Evaluation and assessment of a non-medical expert in the field of alcohol or drug rehabilitation, such as a qualified Employee Assistance Program Counselor.

(8) For further information and discussion on alcohol and drug problems and the Employee Assistance Program, see MP-5, part 1, chapter 792, appendix A. Because of periodic changes in case law regarding reasonable accommodation for employees with alcohol and drug abuse problems, supervisors should consult with the Human Resources Management Service/Division prior to confronting an employee with a suspected problem.

(9) Executive Order 12564 on the Drug-Free Federal Workplace generally requires agencies to initiate disciplinary or adverse action against any employee who is found to use illegal drugs.

(10) Last Chance and Abeyance Agreements. Management may enter into last chance or abeyance agreements with employees who have an alcohol or drug abuse problem. These agreements are generally entered into after a disciplinary suspension or adverse action has been proposed, and offer the employee an opportunity to participate in a rehabilitation program while the proposed action or implementation of the decision is held in abeyance. The final decision on the proposed action is based on whether the employee's participation is successful, and/or whether further misconduct occurs. A primary benefit of last chance or abeyance agreements is that the agency's reasonable accommodation efforts are clearly documented for the record. Since case law in this area is constantly evolving, and there are no set formulas for last chance or abeyance agreements, officials involved in preparing such agreements should contact the Regional Counsel or General Counsel, as appropriate, or the Office of Human Resources Management (051) in VA Central Office, when questions arise. Sample abeyance agreements are contained in appendix C to this chapter.

(a) There is no set formula for abeyance or last chance agreements:

1 they are tailored to the individual situation;

2 they are fair, and provide some potential consideration or benefit to the employee (generally the agency's agreement to withhold an action which it could take);

3 they can be imposed unilaterally by the agency, or

4 negotiated with the employee or his representative, (if they involve a waiver of rights, the employee must agree);

5 they can be imposed at several stages of the adverse action process: after a proposal, after a decision, or even after the action has been effected; and,

6 if the conditions are not met, the agency can take immediate action (no need to wait until the end of the period, or to give a new notice).

(b) Abeyance and last chance agreements should contain at least the following:

1 a time limit and conditions tailored to the situation;

2 a clear statement of all the agency's requirements of the employee including satisfactory participation in a rehabilitation program, and satisfactory conduct;

3 a description of behaviors that will be considered evidence of compliance or failure to comply with the requirements; and,

4 an explanation of what the agency will do if the employee falls to comply, and what the agency will do if the employee complies.

(c) When an action is taken based on violation of an abeyance agreement, the following is recommended:

1 the violation should not become part of the charges, but should be used only to show that the employee violated the agreement and thus triggered the agency's action;

2 the letter to the employee should clearly describe how the employee violated the provisions of the agreement (MSPB will require proof of violations); and,

3 .a the agency should proceed on the basis of the original Charges only.

c. Non-Disciplinary Reasons Resulting in Removal, or Reduction in Grade or Pay. (See sec. C, par. 5d, of this ch.)

d. Reductions in Grade or Pay, or Removal Based on a Combination of Performance and Conduct Related Factors. (See sec. C, par. 5e, of this ch.)

e. Involuntary Leave. The authority of agencies to impose involuntary leave status on employees has been significantly curtailed by several Merit Systems Protection Board (MSPB) decisions. These decisions have held that the use of enforced leave as an alternative when dealing with employees who wish to work but appear to be mentally or physically unable to do so and who pose a safety threat to themselves or others in the workplace, constitutes a disciplinary suspension and is thus an appealable action, if the suspension exceeds 14 calendar days.

Otherwise, the action is grievable. However, when an employee, because of vicious or intemperate conduct or illness (mental or physical), is regarded as presenting an immediate threat to Government property or to the well-being of the employee, fellow workers, or the general public, several other alternatives may be considered as circumstances require; detail to other duties, sick or annual leave with the employee's consent, or non-duty paid status for a limited period, any of which may present some immediate relief to the situation. (See par. 7b(2)above.)

f. Indefinite Suspension. In cases where management foresees a need for considerable time to complete its inquiries, medical examinations, or investigation, and make a determination in the case, consideration may be given to imposing an indefinite suspension. The basis for the indefinite suspension would be the need to have the employee away from the worksite pending inquiry, investigation, or the medical examination process. During the advance notice period of a proposed indefinite suspension, the employee may be placed in a non-duty paid status, and in cases involving the commission of a crime, the crime provisions procedure may be followed. (See sec. C, par. 14, of this ch.) An indefinite suspension must specify a completion point (e.g., acquisition of medical documentation sufficient for management to make an informed decision). The employee may not be suspended without such a completion point set out in the proposal, and the suspension cannot continue once the completion point is reached. At the completion of the suspension, management must either return the employee to his or her position, detail or reassign the employee to another position, remove the employee for either disciplinary or non-disciplinary reasons related to inability to perform, or take other appropriate administrative action. Due to the changing nature of case law in the area of indefinite suspensions, officials involved in such actions should consult with the Regional or General Counsel, as appropriate, or the Office of Human Resources Management (051) in Central Office prior to initiating action.

g. Progressive Discipline. Using the least severe action which, in the supervisor's judgment, will most likely correct the employee's misconduct is a commonly recognized principle. It is most applicable in repeated infractions of a minor nature (e.g., brief tardiness). However, it does not prohibit issuance of a more severe penalty (e.g., suspension or removal) prior to issuance of each and every lesser penalty. For example, it is not always appropriate to issue an admonishment and/or a reprimand prior to issuance of a suspension or removal. Sound supervisory discretion and judgment must be applied in all cases fully considering any aggravating and/or mitigating circumstances. The concept of progressive discipline and the recommended guidance provided by the Table of Offenses and Penalties (see app. D) is not intended to preclude the exercise of discretion in determining appropriate action, but rather to serve as an aid to maintaining consistency. The facts of the case, degree of willfulness of the employee's violation of VA conduct rules, and the seriousness of the misconduct and its resultant impact on VA operations, may be examples of reasons for necessitating consideration of more severe discipline (e.g., suspension without prior admonishment or reprimand).

CHAPTER 752. DISCIPLINE AND ADVERSE ACTIONS

SECTION B. DISCIPLINARY ACTION

1. ADMONISHMENT

a. Definition. An admonishment is a written statement of censure given to an employee for a minor act of misconduct.

b. Procedure. An admonishment will be in the form of an official letter to the employee describing the reasons for the action. It will advise the employee that a copy of the admonishment and any written explanation or comments regarding the admonishment will be placed in the employee's Official Personnel Folder (OPF). The admonishment will contain a statement advising the employee of the right to appeal the action under the grievance procedure in MP-5, part 1, chapter 771 or the negotiated grievance procedure, as appropriate, and will also contain a statement informing the employee of the withdrawal provisions. Before release to the employee, the admonishment will be forwarded to the Human Resources Management Office for review and concurrence. A sample letter of an admonishment appears in appendix A, figure 1.

c. Withdrawal of Admonishment. After 2 years (or whatever time frame is specified in any applicable labor-management agreement), admonishments will be removed from the OPF and destroyed. However, in cases of patient abuse, an admonishment may be retained in the OPF for as long as the individual is employed by VA. The employee's supervisor may, after 6 months, make a written request to the Human Resources Management Officer that the admonishment be withdrawn, if the employee's conduct so warrants. Upon receipt of such a request, the Human Resources Management Officer will return the admonishment to the supervisor for destruction. If the request is initiated by a supervisor below the level of the official who issued the admonishment, it must be approved at or above the level of the official who issued it.

(1) In determining whether an admonishment should be withdrawn early, consideration should be given to the fact that it may not be used after its withdrawal as a past disciplinary record in connection with any future proposed disciplinary or adverse action. This is especially important with respect to admonishments for patient abuse.

(2) When an admonishment has been withdrawn early and destroyed, the supervisory official will inform the employee. In order to assure the employee that no record remains in the OPF, the supervisor may wish to destroy it in the employee's presence or give it to the employee for disposition.

(3) Since the admonishment may be appealed under the grievance procedure initially and, except in patient abuse cases, will automatically be removed from the OPF after 2 years, a grievance may not be filed based on a supervisor's decision not to remove it earlier than the expiration date.

d. Right to File a Grievance. The employee may appeal an admonishment under the VA grievance procedure in MP-5, part 1, chapter 771, or under the negotiated grievance procedure, as appropriate. Under the VA grievance procedure, the grievance must be submitted through supervisory channels not later than 15 days after receipt of the admonishment. Grievances from bargaining unit employees must be filed in accordance with the provisions of the applicable negotiated grievance procedure. Reference should be made to that procedure for the appropriate steps and time limits.

2. REPRIMAND

a. Definition. A reprimand is a written statement of censure given to an employee for misconduct.

b. Procedure. A reprimand will be in the form of an official letter to the employee describing the reasons for the action. It will advise the employee that a copy of the reprimand and any written explanation or comments regarding the reprimand will be placed in the employee's OPF. The reprimand will contain a statement of the right to appeal the action under the VA's grievance procedure in MP-5, part 1, chapter 771, or the negotiated grievance procedure, as appropriate, and will also contain a statement informing the employee of the withdrawal provisions. Before release to the employee, the reprimand will be forwarded to the Human Resources Management Office for review and concurrence. A sample letter of reprimand appears in appendix A, figure 2.

c. Withdrawal of Reprimand. After 3 years (or whatever time frame is specified in any applicable labor-management agreement), a reprimand will be removed from the OPF and destroyed. However, in cases of patient abuse, the reprimand may be retained in the OPF for as long as the individual is employed by VA. The employee's supervisor may, after 2 years, make a written request to the Human Resources Management Officer that the reprimand be withdrawn, if the employee's conduct so warrants. Upon receipt of such a request, the Human Resources Management Officer will return the reprimand to the supervisor for destruction. If the request is initiated by a supervisor below the level of the official who issued the reprimand, it must be approved at or above the level of the official who issued it.

(1) In determining whether a reprimand should be withdrawn early, consideration should be given the fact that after its withdrawal, it may not be used as a past disciplinary record in connection with any future proposed disciplinary or adverse action. This is especially important with respect to reprimands for patient abuse.

(2) When a reprimand has been withdrawn early and destroyed, the supervisory official will so inform the employee. In order to assure the employee that no record remains in the OPF, the supervisor may wish to destroy it in the employee's presence or give it to the employee for disposition.

(3) Since the reprimand may be appealed under the grievance procedure initially and, except in patient abuse cases, will automatically be removed from the OPF after 3 years, a grievance may not be filed based on a supervisor's decision not to remove it earlier than the expiration date.

d. Right to File a Grievance. The employee may appeal the reprimand under the VA grievance procedure in MP-5, part 1, chapter 771, or under the negotiated grievance procedure, as appropriate. Under the VA grievance procedure, the grievance must be submitted through supervisory channels not later than 15 calendar days after receipt of the reprimand. Grievances from bargaining unit employees must be filed in accordance with the provisions of the applicable negotiated grievance procedure. Reference should be made to that procedure for the appropriate steps and time limits.

3. DISCIPLINARY SUSPENSION OF 14 CALENDAR DAYS OR LESS

a. Actions Covered. The provisions of this paragraph apply to suspensions of 14 calendar days or less.

b. Employees Covered. This paragraph applies to all VA employees except:

(1) Employees in the Veterans Health Administration (VHA) appointed under 38 U.S.C. Chapter 74 covered by a proficiency rating system. (Note: Employees appointed under 38 U.S.C. 7401(2) and (3) are covered by the provisions of this section.)

(2) Canteen Service employees appointed under 38 U.S.C. 78 (see Veterans Canteen Service Procedures, VCS-1);

(3) Schedule C employees;

(4) An individual appointed by the President;

(5) Re-employed annuitants; and,

(6) Members of the Senior Executive Service.

c. Employee Entitlements

(1) An advance notice stating the specific reasons for the proposed suspension;

(2) A reasonable time to answer, orally or in writing, or both orally and in writing, and to furnish affidavits or other documentary evidence in support of the answer;

(3) The right to be represented by an attorney or other representative;

(4) The right to review the evidence relied upon to support the proposed action (evidence which may not be disclosed to the employee or the employee's designated representative may not be used to support the reasons in a notice of proposed suspension). The evidence will be maintained in the Human Resources Management Office;

(5) A reasonable amount of official time, if otherwise in a duty status, for reviewing the material relied upon to support the proposed action, and for preparing and presenting a written and/or oral reply. This also applies to the employee's representative, If a VA employee;

(6) The right to reply to either the decision official or to someone with authority to recommend what the final decision should be;

(7) A written decision and the specific reasons supporting the decision at the earliest practicable date; and,

(8) The right to appeal the action under the VA grievance procedure or under the negotiated grievance procedure, as appropriate. There is no right of appeal to the Merit Systems Protection Board of a disciplinary suspension of 14 days or less.

d. Procedures

(1) **Preparation.** The appropriate supervisory official, with the assistance of the Human Resources Management Office, will prepare and issue the advance notice of proposed suspension.

(2) **Review.** Before being given to the employee, the notice will be reviewed by the Human Resources Management Office for compliance with applicable statutes, regulations, labor management agreements, and VA policy. The Human Resources Management Office should also review the evidence and, if indicated, make a recommendation to the proposing official concerning the propriety of the action.

(3) **Content of Proposed Notice.** The advance notice of proposed suspension must contain the following information (see app. A, fig. 3):

(a) the number of days that it is proposed that the employee be suspended;

(b) a statement of the specific reasons for the proposed action, including names, dates, places, and other data, sufficient to enable the employee to fully understand the reasons and to afford the employee a reasonable opportunity to respond to them;

(c) a statement that the employee has the right to be represented by an attorney or other representative;

(d) a statement that the employee has the right to reply orally or in writing, or both orally and in writing, and to submit affidavits and other documentary evidence in support of the reply;

(e) a statement of the amount of time the employee has to submit the reply or replies (time limits may vary according to applicable labor-management agreements, but in no event may be less than 24 hours).

(f) a statement informing the employee that the material relied upon to support the reasons for the proposed suspension will be made available to the employee and his/her representative upon request;

(g) a statement that if the employee has any questions about the reasons for the proposed suspension, he or she may contact the official who signed the proposed notice or the Human Resources Management Office for further explanation;

(h) a statement identifying the decision official;

(i) a statement that the employee's written reply should be Submitted through supervisory channels to the decision official and that the decision official or his or her designee will receive the employee's oral reply;

(j) when an employee's past disciplinary record is to be considered as part of the basis for the proposed suspension, a statement will be included that specifically cites and identifies the previous infractions and penalties, and advises the employee that he or she may make a statement concerning the consideration to be given to the past record in determining a penalty in the present case;

1 If cited, the previous disciplinary record will not be set forth as a current reason, but will be stated in a paragraph separate and apart from the current reasons. In order to be cited in the post record paragraph, the disciplinary action must meet the following requirements:

(a) The action must have been in writing;

(b) The action must be a matter of record; and

(c) The employee must have been given an opportunity to contest the action to a higher authority than the official who imposed it. (Note: Challenges to the past action need not be completed prior to citing the action in the past record paragraph.)

2. Counselings and charges of "Absent Without Leave" (AWOL) without concurrent disciplinary action are not disciplinary actions and may not be included in the past record paragraph, However, counselings may be cited in a separate paragraph and may be considered in determining appropriate action against an employee. If such counselings are cited, the counseling must have been in writing and must be included in the evidence file used to support the proposed action. Any references to letters or memoranda of counseling in the proposal letter must be sufficiently clear so as to enable the employee to comment on the weight to be given to the counseling in determining the final action.

3. Suspensions may not be cited in the past record paragraph unless the suspension has actually been served by the employee.

(k) a statement that full and impartial consideration will be given to the employee's reply, if a reply is made;

(l) a statement that the employee will be given a written decision as soon as possible after his or her reply has been fully considered or after the expiration of the time allowed for reply, if the employee does not reply;

(4) Employee's Reply

(a) If the employee requests an opportunity to reply orally, the decision official will receive the employee's reply or will designate a representative to receive it. The representative designated to receive the reply will be an official who has authority to recommend what final decision should be made. The right to reply orally includes the right to be given a reasonable opportunity to make any plea which the employee believes might sway the final decision in his or her case. The employee's oral reply must not be restricted to matters dealing solely with the charges against him or her. The employee must be permitted to plead extenuating circumstances or make any other argument he or she deems proper.

(b) A written summary of the employee's oral reply must be made and placed in the evidence file. If a designee is named to hear the oral reply, the summary may contain a specific recommendation on the proposed action.

(c) The employee may reply in writing to the notice in addition to making an oral reply or instead of an oral reply.

(d) An employee's failure to reply is not to be considered an admission of the charges. The burden of proof rests with management to support its reasons for the action.

(5) Arriving at a Final Decision on a Proposed Suspension

(a) The decision official will give full and impartial consideration to the employee's reply, if any, and all evidence of record. If the decision official finds one or more of the reasons in the advance notice sustained, he or she will give consideration to the table of examples of offenses and penalties in appendix D to this chapter in determining the appropriate penalty. This appendix also lists several factors to consider in arriving at a decision.

(b) A decision adverse to the employee must be based only on the reasons stated in the notice of proposed action. If none of the reasons are sustained, either in whole or in part, no penalty may be imposed, regardless of any past record cited in the notice.

(c) The penalty may not be more severe than that proposed in the notice of proposed action.

(d) If the notice of proposed suspension is determined to be procedurally defective, or if it is found that additional reasons other than those set forth should be considered or that the appropriate penalty should be more severe than that proposed, the notice of proposed suspension

will be rescinded and a new notice of proposed action issued. The new notice will include a new advance notice period and another opportunity to reply orally or in writing, or both orally and in writing.

(6) Decision Notice

(a) The decision letter will be dated and signed by the appropriate decision official, and will be delivered to the employee prior to the effective date of the action.

(b) Before the decision is released to the employee, it will be reviewed by the Human Resources Management Office for compliance with applicable statutes, OPM regulations, and VA policies. The Human Resources Management Office will also review the merits of the case and any mitigating factors and, if indicated, advise the decision official concerning the propriety of the action.

(c) The decision letter will contain the following information (see app. A, fig. 4):

1. A statement that consideration has been given to all evidence developed, including the employee's reply. A written reply made by a representative on behalf of the employee is considered to be an employee's reply. If the employee replies both orally and in writing, both replies must be mentioned.

2. A statement of the decision official's determinations regarding what reasons, if any, in the advance notice were sustained and what reasons, if any, were not sustained.

3. If a record of prior disciplinary actions was cited in the advance notice, the decision will state whether the action takes the past record, as cited in the advance notice, into consideration in determining proper action.

4. A statement of the inclusive dates of the suspension.

5. A statement concerning the employee's rights to file a grievance, and the time limit within which it is must be filed.

6. A statement advising the employee that a further explanation of his or her appeal rights may be obtained by consulting the Human Resources Management Office.

(d) The guidelines in section C, paragraph 13e, concerning delivery should be followed.

CHAPTER 752. DISCIPLINE AND ADVERSE ACTIONS

SECTION C. ADVERSE ACTIONS

1. Actions Covered

The provisions of this section apply to suspensions for more than 14 days, removals, reductions in grade or pay, furloughs of 30 days or less, or other actions which result in an involuntary separation or reduction in grade or pay when such actions are not based solely on unacceptable performance.

2. Employees Covered

a. Among those employees covered by the provisions of this section are:

(1) Employees in the competitive service who have completed a probationary or trial period for their current appointment;

(2) Employees in the excepted service who are preference eligibles and who have completed 1 year of current continuous employment in the same or similar positions;

(3) Employees in the excepted service (other than a preference eligible) who are not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; and,

(4) Employees in the excepted service (other than a preference eligible) who have completed 2 years of current continuous service in the same or similar positions under other than a temporary appointment limited to 2 years or less.

b. Most adverse actions will be initiated against employees who meet the criteria described in the previous subparagraph. However, 5 CFR 752.401 (c) provides a comprehensive list of all employees covered by the adverse action provisions of this chapter and should be consulted when questions arise concerning employee coverage.

3. EMPLOYEES EXCLUDED

a. Physicians, dentists, nurses, nurse anesthetists, expanded function dental auxiliaries, physician assistants, podiatrists, optometrists, and other health care professionals appointed under 38 U.S.C. 74 (see pt. 11 of this manual). (Note: Employees appointed under 38 U.S.C. 7401(2) and (3) are covered by the provisions of this section.)

b. Schedule C employees;

c. An individual appointed by the President; and,

d. Members of the Senior Executive Service (except as specifically covered by sec. C, par. 15 of this chapter).

4. ACTIONS EXCLUDED

The provisions of this section do not apply to the following actions:

- a. Reduction in force;
- b. Reduction in grade of a supervisor or manager who has not completed the probationary period under 5 U.S.C. 3321 (a)(2) if such reduction is to the grade held immediately before becoming such supervisor or manager;
- c. Reduction in grade or removal based solely on unacceptable performance under Part 432 of OPM regulations;
- d. Any action taken by the MSPB under the provisions of 5 U.S.C. 1204; e. Action which entitles an employee to grade retention under Part 536 of OPM regulations and an action to terminate this entitlement;
- f. Voluntary action initiated by the employee;
- g. Action taken or directed by the OPM under Part 731 or Part 754 of their regulations;
- h. Involuntary retirement because of disability under Part 831 of OPM regulations;
- i. Termination of an appointment on the expiration date specified as a basic condition of employment at the time the appointment was made.
- j. Action which terminates a temporary or term promotion and returns the employee to the position from which temporarily promoted, or to a different position of equivalent grade and pay, in accordance with Part 335 of OPM regulations.
- k. Cancellation of a promotion to a position not classified prior to the promotion;
- l. Placement of an employee serving on an intermittent, part-time, or seasonal basis in a non-duty, non-pay status in accordance with conditions established at the time of appointment;
- m. Reduction of an employee's rate of pay from a rate which is contrary to law or regulation to a rate which is required or permitted by law or regulation;
- n. Reduction in rank not accompanied by a reduction in grade;

- o. Termination of employees during a probationary or trial period;
- p. Termination of employees serving under Veterans Readjustment Appointments during the first year of a 2 year trial period; and,
- q. Any other action excluded under Part 752 of OPM regulations.

5. TYPES OF ADVERSE ACTIONS

Suspension of More than 14 Calendar Days. A suspension for more than 14 calendar days is an enforced temporary non-pay status and absence from duty. Such action is given for serious misconduct. It may also be given for continued or repeated acts of misconduct of a less serious nature.

b. Reduction in Grade for Disciplinary Reasons. A reduction in grade imposed for disciplinary reasons is proper when such an action would be effective in correcting a situation and thus serve to retain a valuable and trained employee. For example, a reduction in grade may be appropriate when the offense indicates unsuitability for supervisory duties but not for duties of a non-supervisory nature.

c. Removal for Disciplinary Reasons. Removal for disciplinary reasons is an involuntary separation taken for serious misconduct or for continued or repeated acts of misconduct of a less serious nature.

d. Non-Disciplinary Reasons Resulting in Removal or Reduction in Grade or Pay. An action may be non-disciplinary, but at the same time adverse to the employee. For example, the removal of an employee because of refusal to accompany the activity to a new location is an adverse action even though no disciplinary element is involved. Demotion or separation due to the employee's failure to meet the physical requirements of the position is another example of an adverse action which did not grow out of a disciplinary situation.

e. Demotion or Removal Based on Combination of Performance and Non-Performance Related Factors. Adverse actions based on a combination of performance and either misconduct or inability to do the work of the position because of disability, are processed under this chapter,

f. Furlough for 30 days or Less. This is a non-disciplinary adverse action taken on the basis of an emergency situation, lack of work or funds, or other non-disciplinary reasons. Furloughs are appropriate Only when motivated by temporary conditions. MP-5, part 1, chapter 351 contains procedures for Identifying employees for furlough and requesting furlough authority.

6. BURDEN OF PROOF DURING APPEAL PROCESS

a. Prior to initiating an adverse action, officials involved in the decision making process should consider the burden of proof which must be met in order to sustain the adverse action on appeal.

b. When taking an adverse action against an employee, the agency bears the burden of proof under 5 U.S.C. 7701 (c)(1) on all reasons and issues that form the basis for the adverse action.

c. The agency has the burden of proof on the following 3 elements of its decision on all adverse actions taken under 5 U.S.C. 75:

(1) **Proof of Charges.** The agency must prove the factual basis of the misconduct relied on in taking the action by a "preponderance of the evidence." Preponderance of the evidence means that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient evidence to support a conclusion that the reasons for taking action are more likely to be true than not true. This standard of proof is used by the MSPB and arbitrators in deciding appeals and grievances. In proving the charges themselves, it may also be necessary to establish a number of sub-elements. An example would be a case involving charges of absence without leave (AWOL). In such a case, the agency must prove not only that the employee was absent on the date(s) in question, but also that its decision to place the employee in an AWOL status, rather than in an approved leave status, was reasonable.

(2) **Nexus.** Nexus is the element in an adverse action which requires proof of an adequate relationship between the act of misconduct and the efficiency of the service.

(3) **Appropriateness of Penalty.** The agency must establish that the penalty selected is within the tolerable limits of reasonableness (see Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1 98 1), for a discussion of the Board's authority to review penalties, and app. D to this chapter which lists the "Douglas" factors and contains the Table of Offenses and Penalties). The sample decision letter in appendix A, figure 5, contains suggested language regarding the "Douglas" factors which can be used in the adverse action decision notice.

7. EMPLOYEE ENTITLEMENTS

a. 30 days advance written notice, stating the specific reasons for the proposed action, except when invoking the crime provision (see sec. C, par. 14 of this ch.), or for furloughs without pay due to unforeseeable circumstances (see MP-5, pt, 1, ch. 351 for further guidance);

b. A reasonable time, but not less than 7 days (or whatever time frame is specified in any applicable labor-management agreement) to answer orally and/or in writing and to furnish affidavits or other documentary evidence in support of the answer;

c. Right to be represented by an attorney or other representative;

d. Right to review the evidence relied upon to support the proposed action (material which cannot be disclosed to the employee or to his or her representative cannot be used to support the reasons in a notice of proposed adverse action and must not be included in the evidence file).

e. A reasonable amount of official time, if otherwise in a duty status, for reviewing the evidence relied upon to support the proposed action, and for preparing and making a written and oral reply. This also applies to the employee's representative if a VA employee.

f. A written decision and the specific reasons therefore at the earliest practicable date;

g. Right to appeal the action to MSPB or under a negotiated grievance procedure (NGP), if the NGP covers appeals of adverse actions and the employee is a member of the bargaining unit, or to file a discrimination complaint under 29 CFR 1613 of the Equal Employment Opportunity Commission's regulations in those instances where the employee has raised an allegation of discrimination during the advance notice period of the adverse action.

8. EXCEPTIONS TO 30 DAYS ADVANCE NOTICE

a. **Crime Provision.** The 30-day advance notice period is not required where there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed. Paragraph 14 of this section contains guidance concerning the crime provision, and the use of indefinite suspensions in conjunction with the crime provision.

b. The 30-day advance notice and opportunity to answer are not necessary for furlough without pay due to unforeseeable circumstances, such as sudden breakdown in equipment, acts of God (e.g., flood, tornado, etc.) or sudden emergencies requiring immediate curtailment of activities (see MP-5, pt. 1, ch. 351 for further guidance).

9. NOTICE OF PROPOSED ACTION

a. Before being released to the employee, the notice of proposed action will be reviewed, by the Human Resources Management Office for compliance with applicable statutes, regulations, labor-management agreements, and VA policy. The Human Resources Management Office will also review the evidence and, if indicated, provide guidance concerning the propriety of the action.

b. The advance notice of proposed action must contain the following information (see app. A, fig. 3):

(1) The nature of the action proposed (i.e., removal, length of suspension, demotion, etc.);

(2) A statement of the specific reasons for the proposed action, including names, dates, places, and other data, sufficient to enable the employee to fully understand the reasons and to afford the employee a fair opportunity to respond to them;

(3) A statement that the employee may be represented by an attorney or other representative;

(4) A statement that the employee has the right to reply orally or in writing, or both orally and in writing, and to submit affidavits and other documentary evidence in support of the reply;

(5) A statement of the amount of time the employee has to submit the reply, or replies. Time limits may vary according to applicable labor-management agreements, but in no event may it be less than 7 days;

(6) A statement that if the employee has any questions about the reasons for the proposed adverse action, he or she may contact the official who signed the advance notice or the Human Resources Management Office for further explanation;

(7) A statement Identifying the decision official;

(8) A statement that the employee's written reply should be submitted through supervisory channels to the decision official and that the decision official, or designee, will receive the employee's oral reply;

(9) When an employee's past disciplinary record is to be considered as part of the basis for the proposed adverse action, a statement should be included that specifically cites and identifies the previous infractions and penalties, and advises the employee that he or she may reply orally or in writing, or both orally and in writing, with respect to those previous infractions. The statement will also advise the employee that he or she may submit supporting evidence, including affidavits, and may make a statement concerning the consideration to be given to the past record in determining proper action:

(a) If cited, the previous disciplinary record will not be set forth as a current reason, but will be stated in a paragraph separate and apart from the current reasons. In order to be cited in the past record paragraph, the disciplinary action must meet the following requirement:

1. The action must have been in writing;

2. The action must be a matter of record; and,

3. The employee must have been given an opportunity to contest the action to a higher authority than the official who imposed it. (Note: Challenges to the post action need not be completed prior to citing the action in the past record paragraph.)

(b) Counselings and charges of AWOL without concurrent disciplinary action are not disciplinary actions and may not be included in the post record paragraph. However, counselings may be cited in a separate paragraph and may be considered in determining appropriate action against an employee. If such counselings are cited, the counseling must have been in writing and must be included in the evidence file used to support the proposed action. Any references to letters or memoranda of counseling in the proposal letter must be sufficiently clear so as to enable the employee to comment on the weight to be given to the counseling in determining the final action.

(c) Suspensions may not be cited in the past record paragraph unless the suspension has actually been served by the employee.

(10) A statement that full and impartial consideration will be given to the employee's reply, if a reply is made;

(11) A statement that the employee will be given a written decision as soon as possible after his or her reply has been fully considered or after the expiration of the time allowed for reply, if the employee does not reply;

(12) A statement advising the employee of the duty and pay status in which he or she will be carried during the notice period;

(13) A statement that if it is decided to take the proposed adverse action, such action will be effective not less than 30 days from the day following the date of receipt of the notice;

(14) A statement informing the employee where the evidence relied on to support the reason(s) for the proposed action will be available for the employee's (and/or his or her designated representative's) review. (Generally, the evidence file should be maintained in the Human Resources Management Office.);

(15) A statement that:

(a) Informs the employee that he or she will be allowed a specific number of hours of official duty time (if otherwise in an active duty status) for reviewing the notice, for preparing a written and/or oral reply, for securing affidavits; and

(b) Identifies the person with whom the employee should make arrangements for the use of official time. (The time allowed will depend on the facts and circumstances of each individual case. In most cases, 8 official duty hours may be deemed sufficient. However, for more complex cases, more than 8 hours may be allowed. Since the time spent by the employee in reviewing the evidence and preparing the reply may be spread over several days (i.e., the 7-day reply period), documentation should be made as to how much official duty time is used each day. If the employee requests additional official time beyond what was originally approved, the request may be honored if it is reasonable.)

10. STATUS OF EMPLOYEE DURING ADVANCE NOTICE PERIOD OF ADVERSE ACTION

a. **Duty Status.** Ordinarily the employee will be retained in a pay and active duty status in his or her position at current grade and salary, during the period pending a decision on a proposed action.

b. **Detail, Leave or Paid Non-Duty Status.** During the advance notice period of a proposed removal, it may be necessary to remove the employee from the worksite. In those instances where it is determined that the employee's continued presence at work during the advance notice period might pose a threat to the employee or others, result in loss of or damage to Government property, or otherwise jeopardize legitimate Government interests, the following alternatives can be considered:

(1) Detailing the employee to other duties where he or she is no longer a threat to safety, to the VA's mission, or to Government property;

(2) Allowing the employee to take leave (annual, sick, leave without pay), or carrying him or her in an absent without leave status if the employee has absented himself or herself from the worksite without requesting leave;

(3) Curtailing the notice period in cases where the agency can invoke 5 CFR Part 752.404(d)(1) (i.e., the "crime provision");

(4) If none of the above alternatives is available, placing the employee in a paid, non-duty status (i.e., authorized absence for timekeeping purposes) during all or part of the advance notice period.

c. **Emergency Suspensions.** Agencies are not authorized to effect emergency suspensions under the Civil Service Reform Act of 1978,

11. EMPLOYEE'S REPLY

a. If the employee requests an opportunity to reply orally, the decision official will receive the employee's reply, or will designate a representative to receive it. The representative designated to receive the reply will be an official who has the authority to recommend what final decision should be made. The right to reply orally includes the right to be given reasonable opportunity to make any plea which the employee believes might influence the final decision in his or her case. The employee's oral reply must not be restricted to matters dealing solely with the charges against him or her. The employee must be permitted to plead extenuating circumstances or make any other arguments he or she deems proper. A written summary of the oral reply must be made and placed in the adverse action file. If a designee hears the oral reply, the summary may include a recommendation on the proposed action.

b. The employee may reply in writing to the notice, in addition to making an oral reply or instead of an oral reply.

c. An employee's failure to reply is not to be considered an admission of the charges. The burden of proof rests with management to support its reasons for the action.

d. In making a reply, the employee may allege alcohol or drug abuse or some other disabling medical condition.

(1) If the employee alleges that a physical or mental condition or disability is causing the conduct or performance problems, the decision official will allow the employee a reasonable opportunity to supply medical documentation in order to assess the effect of the condition on the employee's performance or conduct. If the documentation is not sufficient or needs clarification, in limited instances a medical examination may be offered or ordered under the provisions of 5 CFR Part 339. This documentation will assist in determining whether the employee has a disability for the purpose of considering reasonable accommodation. If the employee's unacceptable performance or conduct is unrelated to the nature of the disability, the employee is not a qualified employee with a disability and reasonable accommodation need not be considered.

(2) Reasonable accommodation will be afforded to the known physical or mental limitations of a qualified employee with a disability unless it can be demonstrated that the accommodation would impose an undue hardship on the operation of the Department. The type of accommodation will be specific to the individual circumstances. In determining whether an accommodation would impose an undue hardship on the operation of the agency, a number of factors should be considered, including but not limited to, the nature and cost of the accommodation, and the impact such accommodation would have on the workload of other employees.

(3) When an employee with a disabling medical condition cannot be reasonably accommodated, management may, depending on the circumstances, wish to change its cause for action against the employee prior to making a final decision on the proposed adverse action. For example, if an employee whose removal has been proposed for misconduct, clearly demonstrates through medical evidence that there is a causal relationship between the actions on which the proposed removal is based and his or her medical condition, the notice of proposed removal for reasons of misconduct should be canceled and a new notice of proposed separation for disability issued, based on the medical evidence.

(4) For further information relating to medical documentation and medical determinations, see 5 CFR Part 339. For additional information on disability and reasonable accommodation considerations, see 29 CFR 1614.203.

(5) When the employee raises a drug or alcohol problem, management will, if appropriate, refer the individual to the Employee Assistance Program. MP-5, part 1, chapter 792, appendix A, and section A, paragraph 8 of this chapter contain guidance on this program.

(6) When an employee raises a medical condition during the advance notice period but fails to provide supporting evidence, or to submit medical evidence after being given an opportunity to do so, the decision official will base the final decision on the reasons in the notice of proposed adverse action. This is also true when it is determined by VA medical authorities that, despite medical evidence submitted by the employee, there is no causal relationship between the employee's medical condition and the reasons for the proposed adverse action.

(7) In any case where an employee raises a medical condition and is eligible for disability retirement, the employee will be counseled regarding disability retirement application procedures. However, an employee's application need not preclude or delay the final decision on the proposed action.

12. ARRIVING AT FINAL DECISION ON THE PROPOSED ADVERSE ACTION

a. The decision on a proposed action should be made by an official who is in a higher position than the official who proposed the action. In all cases, it is essential that consideration be given to the requirement that the employee be given an opportunity to reply and to have that reply considered before the final decision is made.

b. The decision official will give full and impartial consideration to the employee's reply(ies), if any, and all evidence of record. If the decision official sustains one or more reasons in the advance notice, he or she will give consideration to the table of examples of offenses and penalties in appendix D to this chapter in determining the appropriate penalty. The decision official will also carefully consider those issues discussed in paragraph 6 of this section regarding the burden of proof which must be met in order to sustain the adverse action on appeal.

c. In arriving at the decision, the decision official must not consider any reasons for action other than the reasons stated in the notice of proposed action. If none of the reasons are sustained, either in whole or in part, no penalty may be imposed, regardless of any past record cited in the notice.

d. The penalty may not be more severe than that proposed in the notice of proposed action.

e. If the notice of proposed adverse action is determined to be procedurally defective so as to result in harmful error (i.e. error in the application of these procedures which, in the absence or correction of the error, might have caused management to reach a conclusion different than the one reached) or if it is found that additional reasons other than those set forth should be considered or that the appropriate penalty should be more severe than that proposed, the notice of proposed adverse action will be rescinded and a new notice of proposed action issued. The notice will include a new advance notice period and another opportunity to reply orally or in writing, or both orally and in writing. If additional evidence becomes available to further support the charges in the advance notice, but does not necessarily provide a basis to alter the charges or the proposed

penalty, the employee will be afforded the opportunity to respond to the new evidence before a final decision is made.

f. Officials involved in taking an adverse action against an employee should be aware of the prohibitions against improper "ex parte communications." The MSPB has held that agency officials may communicate with each other during the decision making process. However, it is improper for an interested party (e.g. supervisor, proposing official), to pressure the decision official into making an adverse decision. Such communications are improper, and might support reversal of the action on appeal.

13. DECISION NOTICE

a. The decision letter will be dated and signed by the appropriate decision official and will be delivered to the employee prior to the effective date of the action.

b. Before being issued to the employee, the notice will be reviewed by the Human Resources Management Officer for compliance with the procedural requirements of existing statutes, OPM regulations, MSPB decisions, applicable labor-management agreements and VA policies. Any comments the Human Resources Management Office may have concerning the merits of the case and any mitigating factors will be presented to the decision official.

c. The letter of decision will contain the following information (app. A, fig. 5):

(1) A statement that consideration has been given to all evidence developed, including the employee's reply. A written reply made by a representative in behalf of the employee is considered to be an employee's reply. If the employee replies both orally and in writing, both must be mentioned. The decision official should also make a statement regarding consideration that was given to the "Douglas" factors (see sample letter in app. A, fig. 5, for suggested language).

(2) A statement of the decision official's determinations regarding what reasons, if any, in the advance notice were sustained and what reasons, if any, were not sustained.

(3) If a record of prior disciplinary actions was cited in the advance notice, a statement that the action takes the past record, as cited in advance notice, into consideration in determining proper action.

(4) A statement of the effective date, if the penalty Imposed is a demotion or removal; or the inclusive dates, if the penalty is a suspension.

(5) A statement concerning the employee's appeal rights, including the right to file a complaint of discrimination (if appropriate), a grievance under the negotiated grievance procedure (if applicable) or an appeal to the appropriate MSPB Regional Office. Only one of the above options may be elected. An employee shall be deemed to have made an election to raise a matter

under one of the procedures when the employee timely files an appeal with the MSPB, files a formal complaint of discrimination (29 CFR 1613.214), or timely files a grievance in writing in accordance with the provisions of the labor-management agreement.

(6) The statement in the decision letter concerning appeal rights must include the time limit within which an appeal must be filed with MSPB, and the address of the appropriate MSPB Regional Office. Appeals to MSPB must be filed within 20 days of the effective date of the adverse action. Time limits for filing a grievance will be governed by the applicable negotiated grievance procedure.

(7) Indication that a copy of the MSPB regulations and appeal form is attached.

(8) A statement advising the employee that a further explanation of his or her appeal rights may be obtained by consulting the Human Resources Management Office.

d. Non-preference eligible employees appointed under the authority of Schedule A or Schedule B who have completed 1 year, but less than 2 years, of current continuous service must be advised in the decision letter of the right to appeal an adverse action under the agency administrative appeal procedure (see MP-5, pt. 1, ch. 771).

e. It is best to deliver a decision letter to the employee personally and to obtain his or her dated, written acknowledgment of receipt so as to show the date and fact of receipt. If the employee refuses to sign, this should be so noted on the acknowledgment copy. In those instances where the decision letter cannot be personally delivered to the employee, it should be sent by certified mail, return receipt requested, in order to establish that the letter was received. A copy should also be sent to the employee's last known home address of record by regular mail in the event the certified mail is not delivered and/or the employee fails to obtain it from the Postal Service after being notified to do so.

14. ADVERSE ACTIONS RELATED TO THE CRIME PROVISION

a. The "crime provision" of 5 U.S.C. 7513(b)(1) allows the 30 day advance written notice period of an adverse action to be shortened so that expeditious action may be taken when appropriate. This provision is concerned solely with the duration of the advance notice period and the opportunity to answer. It does not deal with the employee's duty status during the advance notice period or the merits of the action. All other procedures except the full 30 day advance notice period of an adverse action apply.

b. In order for this provision to be invoked in connection with an adverse action, there must be reasonable cause to believe that the employee has committed a crime for which a penalty of imprisonment may be imposed (see app. A, fig. 6, for further guidance in this area).

c. The crime provision may be used only in conjunction with a proposal to remove or suspend indefinitely. In those situations in which the retention of the employee in an active duty status

would be inappropriate, but where management wishes to defer final judgment until completion of judicial proceedings, or where evidence to substantiate a removal is not yet available or usable, an indefinite suspension should be proposed. The prime benefits of the indefinite suspension are the expeditious removal of the employee from the premises with the retained option of either reinstating or removing the employee upon completion of the judicial proceedings or further investigation. Action should be taken to propose the employee's removal as soon as sufficient information is available to support charges against the employee concerning the act(s) of misconduct regardless of any subsequent judicial proceedings. The Regional Counsel should be consulted to assure that there is appropriate coordination with the prosecuting office.

d. Conviction may be cause for removal. However, a subsequent acquittal of the employee on appeal could invalidate the cause for action. Thus, the preferred basis for the adverse action is the misconduct which led to the arrest and conviction. If the cause relied upon is the employee's act(s) of misconduct rather than the arrest and conviction, the administrative action by VA will not be affected by subsequent court action on the criminal case. 9. By invoking the crime provision, the 30-day advance notice period may be shortened to whatever is reasonable under the circumstances, but not less than 7 days, to allow the employee to reply orally and/or in writing to a notice of proposed adverse action. If there is a need for Immediate action and it is in the public interest to keep the employee off duty, he or she may be placed in a non-duty status with pay during the advanced notice period of a proposed indefinite suspension or removal, including any period of investigation, To invoke the crime provision and process a removal or indefinite suspension with a curtailed notice period, the following actions should be taken:

(1) Notify the employee in writing that he or she is being put immediately in a non-duty status with pay.

(2) Give the employee a notice either of proposed indefinite suspension pending further investigation or disposition of the criminal action, or of proposed removal when there is sufficient evidence to warrant removal. The notice will advise the employee of the reasonable period to respond orally and/or in writing (not less than 7 days).

(3) issue a decision on the proposed action after the employee has had the stated opportunity to respond orally and/or in writing, and the response has been considered.

(4) With the exception of the shortened notice period and any enforced non-duty status, the proposed adverse action and decision notices must conform in all other aspects to the requirements for initiating and taking adverse actions.

(5) Any case involving the crime provision should be discussed with the Regional or General Counsel, as appropriate. This will prove helpful in obtaining official information regarding an arrest, the charges, indictment, arraignment, etc., needed to establish justification for use of the crime provision,

(6) Sample notices for use in connection with the crime provision may be found in appendix A, figures 6 and 7.

15. ADVERSE ACTIONS IN THE SENIOR EXECUTIVE SERVICE

a. Actions Covered

(1) The provisions of this paragraph apply only to a removal from the Civil Service or a suspension for more than 14 days,

(2) Adverse actions under this paragraph will be based only on misconduct, neglect of duty, malfeasance, or failure to accept a directed reassignment or to accompany a position in a transfer of function,

b. Employees covered. The provisions of this paragraph apply to:

(1) A career employee who-

(a) Has completed the probationary period in the Senior Executive Service (SES);

(b) Is not required to serve a probationary period; or

(c) Was covered under adverse action procedures Immediately before appointment to the SES.

(2) A limited term or limited emergency appointee who-

(a) Received the limited appointment without a break in service in the some agency as the one in which the employee held a career or career-conditional appointment (or an appointment of equivalent tenure as determined by the Office of Personnel Management) in a permanent civil service position outside the SES; and

(b) Was covered under adverse action procedures Immediately before appointment to the SES.

c. Procedures

(1) Since members of the SES are centralized to the Secretary, adverse actions in the SES will be proposed by an appropriate higher level official. The Secretary reserves the right to decide adverse actions against employees in the SES.

(2) All the procedural requirements for adverse actions discussed in this chapter must be met.

16. RECORDS

a. The Department shall retain all relevant documentation concerning disciplinary suspensions and adverse actions in a separate file and make it available for review by the affected employee or his/her representative. At a minimum, the agency's records shall consist of:

- (1) A copy of the notice of proposed action.
- (2) Evidence supporting the action taken including the affidavits of any witnesses.
- (3) The reply of the employee when it is in writing, and/or a summary of any oral reply.
- (4) The notice of decision and the reasons therefore.
- (5) Evidence of the dates the employee received the notice of proposed action and decision.

(6) Copies of prior disciplinary and adverse actions (SF 50-B, Notification of Personnel Action, should be used to document any previous suspensions).

(7) Copies of relevant timecards if the adverse action was based on absence without leave (AWOL).

b. Disciplinary suspension and adverse action files should be maintained and disposed of in accordance with the provisions of MP-1, part 11, chapter 21, appendix B.

APPENDIX A. SAMPLE LETTERS

This appendix consists of sample letters of disciplinary and adverse actions. When using the samples, necessary modifications should be made to comply with local circumstances such as negotiated agreement provisions or local station policies.

SAMPLE ADMONISHMENT

FOR OFFICIAL USE ONLY

(Name of Employee)
(Organization Element)
(VA Office or Field Facility)
(City, State and Zip Code)

SUBJ: Admonishment

1. You are admonished because you were absent without leave for 8 hours on (date). You failed to obtain permission from your supervisor for the absence as required, Your actions are in violation of (cite specific law, regulation, or policy which has been violated, i.e., Medical Center Policy Memorandum Number xx-xx-xx) which requires employees to.....".

2. A copy of this admonishment will be placed in your Official Personnel Folder. You may, if you wish, make a written reply in explanation of your conduct. If you do, it will also be placed in your Official Personnel Folder.

3. This admonishment may remain in your folder for 2 years or it may be withdrawn and destroyed after 6 months, depending entirely on your future behavior and attitude.

Admonishment for patient abuse should read "may remain in your folder as long as you are employed in the VA or it may be withdrawn and destroyed after 6 months, etc.

4. This letter may be used in determining an appropriate penalty if further infractions occur.

5. If you believe that this admonishment is unjustified, you may appeal the action under the (VA or negotiated, as appropriate) grievance Procedure. Your grievance must be submitted through your supervisor (number of days) after you receive this admonishment. For further information about the grievance procedure, you may consult the Human Resources Management Office,

Language may vary based on specific provisions of Negotiated Grievance Procedure.

(Signature of appropriate supervisor)

FOR OFFICIAL USE ONLY

FIGURE 1

SAMPLE REPRIMAND

FOR OFFICIAL USE ONLY

(Name of Employee)
(Organization Element)
(VA Office or Field Facility)
(City, State and Zip Code)

SUBJ: Reprimand

1. You are reprimanded because you were absent without leave for 8 hours on (date). You failed to obtain permission from your supervisor for the absence as required. Your actions are in violation of (cite specific law, regulation, or policy which has been violated, i.e. Medical Center Policy Memorandum Number xx-xx-xx) which requires employees to"

2. This is the second offense of this nature within the past 3 months. On (date) you were admonished for AWOL.

Past record may be cited if considered appropriate.

3. A copy of this reprimand will be placed in your Official Personnel Folder. You may, if you wish, make a written reply in explanation of your conduct. If you do, it will also be placed in your Official Personnel folder.

4. This letter may be used in determining an appropriate penalty if further infractions occur.

5. This reprimand may remain in your folder for 3 years or it may be withdrawn and destroyed after 2 years, depending entirely on your future behavior and attitude.

A reprimand for patient abuse should read "may remain in your folder as long as you are employed by the VA or it may be withdrawn and destroyed after 2 years, etc."

6. If you believe that this reprimand is unjustified, you may appeal the action under the (VA or negotiated, as appropriate) grievance procedure. Your grievance must be submitted through your supervisor (number of days) after you receive this reprimand. For further information about the grievance procedure, you may consult the Human Resources Management Office.

Language may vary based on specific provisions of the Negotiated Grievance Procedure.

(Signature of division or service chief
or higher level official)

FOR OFFICIAL USE ONLY

FIGURE 2

SAMPLE NOTICE OF PROPOSED REMOVAL FOR DISCIPLINARY REASONS
(Applicable for other adverse actions and suspensions of 14 days or less)

FOR OFFICIAL USE ONLY

(Name of Employee)
(Organization Element)
(VA Office or Field Facility)
(City, State and Zip Code)

SUBJ: Proposed Removal

1. It is proposed to remove you from employment with the VA based on the following reasons:

I. On (date), at approximately (time), you allowed patient J.D. to bring a bottle of whiskey on the hospital premises despite the fact that it was your duty (under the standing order for guards) to prevent patients from introducing alcoholic beverages on the hospital premises.

The practice of grouping reasons under general headings, such as 'Neglect of Duty,' or 'insubordination,' etc., is discouraged.

II. At 10:00 a.m., approximately 1 hour after the incident, you were ordered by your immediate supervisor, Mr. John Smith, to report at once to the Chief guard and explain your neglect of duty. However, you told Mr. Smith that you refused to do so and, although he repeated the order, you still did not report to the Chief Guard.

After each charge, cite specific law, regulation, or policy. which has been violated.

III. At 10:00 a.m., immediately following your refusal to carry out the above-mentioned order, you struck Mr. Smith several times with your fists and knocked him down on the floor.

2. You have the right to reply to this notice orally, or in writing, or both orally and in writing and to submit affidavits in support of your reply, showing why this notice is inaccurate and any other reasons why your removal should not be effected. The evidence on which this notice of proposed action is based will be available for your review in the Human Resources Management office, (Room). You will be allowed (give at least (8) or more hours) of official duty time for reviewing the evidence relied on to support the reasons in this preparing a written reply, securing affidavits, and for making a personal reply. Arrangements for the use of official time or requests for additional time should be made with me. You have the right to be represented by an attorney or other representative.

Only applies when employee is in an active duty status. Must be used in adverse actions. Use a reasonable amount of official time for suspension of 14 days or less notice,

FIGURE 3

**SAMPLE NOTICE OF PROPOSED REMOVAL FOR DISCIPLINARY REASONS
(Continued)**

3. You will be given until the close of business (date) to reply to these reasons orally or in writing, or both orally and in writing. Your written reply should be submitted through me to the (deciding official). The (deciding official) will receive your oral reply or will designate an official or officials to receive it. If you do not understand the above reasons why your removal is proposed, contact me, or the Human Resources Management Office (give location) for further explanation.
- At least 7 calendar days is permitted, more if justified by circumstances, or required by the negotiated agreement for members of the bargaining unit.*
4. On 2 previous occasions you refused to follow orders given to you by your supervisor. After the, first occasion, you were admonished by letter of (date) and after the second, you were reprimanded by letter of (date). This past record will be taken into account in determining proper disciplinary action, if one or more of the above reasons is sustained. You may reply orally or in writing, or both orally and in writing, with respect to these previous infractions and penalties and you may submit supporting evidence, including affidavits. In this regard, you may make a statement expressing your views as to the consideration to be given such past record in determining proper action.
- Citation of past record is not considered a current reason. Copies of the past record must be included in the evidence file.*
5. The final decision to effect the action proposed has not been made. The (deciding official), who will make the final decision, will give full and impartial consideration to your reply, if a reply is submitted.
6. If it is the decision of the (deciding official) that you be removed, your removal will be effective not less than 30 calendar days from the day after the date of receipt of this notice.
- Not needed for suspensions of 14 days or less.*
7. You will be given a written decision as soon as possible after your reply has had full consideration, or after the close of business on (same date as in par. 3 above), if you do not reply.
8. You will be retained in an active duty status during the advance notice period.

(Signature of division or service chief or higher level official)

FOR OFFICIAL USE ONLY

FIGURE 3

SAMPLE DECISION LETTER
(Suspension for 14 Calendar Days or Less For Disciplinary Reasons)

FOR OFFICIAL USE ONLY

TO: (Name of Employee)
(Organizational Element)
(VA Office or Field Facility)
(City, State and Zip Code)

SUBJ: Suspension

1. In connection with the letter of (date) which you were given advance notice of your proposed suspension for 10 calendar days, a decision has been made to suspend you for the period (date) through (date), based on the following reason(s):

Whenever possible the decision should be delivered at least 5 days prior to the effective date of an action. In every case, the date set must provide for receipt of decision letter at or prior to the time the action will be effective.

Reason I, as stated in the notice of proposed suspension, is sustained.

2. In reaching this decision, your oral and written replies were carefully considered along with all the evidence developed.

If applicable, also advise the employee that the decision takes into consideration his/her past disciplinary record as cited in the notice of proposed suspension

3. You may appeal this action under the (or negotiated, as appropriate) grievance procedure. Your grievance must be submitted through your supervisor not later than (number of days) after the effective date of the suspension, A further explanation of your appeal rights may be obtained by consulting the Human Resources Management Office.

Language may vary based on specific VA provisions of the Negotiated Agreement

(Signature of division or service chief or higher official)

FOR OFFICIAL USE ONLY

FIGURE 4

SAMPLE DECISION LETTER

(Removal, demotion, Suspension for more than 14 days and other adverse actions)

FOR OFFICIAL USE ONLY

TO:(Name of Employee)
(Organization Element)
(VA Office or Field Facility)
(City, State and Zip Code)

SUBJ: Removal

1. In connection with the letter of (date) which you were given advance notice of your proposed removal, a decision has been made to remove you from employment in effective(date), based on the following reasons:

Whenever possible the decision should in be delivered at least 5 days prior to the effective date of an adverse action. In every case, the VA, date set must provide date set must provide for receipt of the decision letter at or prior to the time the action will be effective.

Reasons I and II as stated in the notice of proposed removal are sustained.
Reason III is not sustained.

2. In reaching this decision, your oral and written replies were carefully considered along with all the evidence developed.

Applicable only if action considers past record.

This decision also takes into consideration your past disciplinary record as cited in your notice of proposed removal.

3. I have also considered other factors including your years of service, your past work record, the seriousness of the offenses with which you have been charged, and there are any mitigating or extenuating circumstances which would justify mitigation of the proposed penalty.

This sample wording pertaining to the decision official's consideration of the "Douglas' factors should be modified according to the specific factors whether considered, and the final decision on the action proposed

I have concluded that the sustained charges against you are of such gravity that mitigation of the proposed penalty is not warranted, and that the penalty of removal is appropriate and within the range of reasonableness.

FIGURE 5

SAMPLE DECISION LETTER (Continued)

(Removal, demotion, suspension for more than 14 days and other adverse actions)

4. (See app. B (as appropriate) for sample for wording on employee appeal rights.)
5. A further explanation of your appeal rights may be obtained by consulting the Human Resources Management Office.
6. (Notice of any other matter required by applicable Labor-Management Relations Agreement should be included.)

(Signature of facility director or
comparable or higher level official)

Enclosure

FIGURE 5

SAMPLE PROPOSED INDEFINITE SUSPENSION

(invoking the "Crime Provision".)

NOTE: According to current case law, the crime provision cannot be invoked based solely on evidence of the employee's arrest. The arrest must be accompanied by circumstances sufficient to show reasonable cause such as an arrest warrant issued by a magistrate or judge, or evidence that the employee was arrested and held for further legal action by a magistrate, or was indicted by a grand jury. This would generally constitute reasonable cause for believing the employee had committed a crime. Case law in this area has been continuously evolving. Officials should contact their Regional counsel or general counsel as appropriate, or the Customer Advisory and Consulting Group (051) in VA Central Office when questions arise.

FOR OFFICIAL USE ONLY

(Name of Employee)
(Organizational Element)
(VA Office of Field Facility)
(City, State and ZIP Code)

SUBJ: Proposed Indefinite Suspension

1. This is to notify you that it is proposed to suspend you from duty and pay status for an indefinite period of time pending (investigation of probable criminal conduct on your part). Should this proposal result in an indefinite suspension and should subsequent administrative determination so warrant, a proposal may be made to remove you while you are in an indefinite suspension status.

2. This proposed indefinite suspension is based on the following reason:

(Describe criminal activity and give date, times and place). On (date), you were arrested by (name of law enforcement agency) and charged with (cite criminal charge). On (date), you were bound over for trial or held for further legal action by (Name of Court or Grand Jury). Because of this, there is reasonable cause to believe that you may be guilty of a crime for which a sentence of imprisonment may be imposed.

3. In light of the seriousness of this situation and on the basis that it is incompatible with your official duties and responsibilities, it is not in the best interest of VA to retain you in a duty status pending investigation of this criminal activity.

FIGURE 6

SAMPLE PROPOSED INDEFINITE SUSPENSION (Continued)

4. You have the right to reply to this notice orally, or in writing or both orally and in writing, and to submit affidavits in support of your reply, showing why this notice is inaccurate and any other reasons why your proposed indefinite suspension should not be effected. The evidence on which this notice of proposed action is based will be available for review in the Human Resources Management Office. You have the right to be represented by an attorney or other representative.
5. You will be given until the close of business on the 7th calendar day after your receipt of this notice to reply to these reasons orally or in writing, or both orally and in writing. Your written reply should be submitted through me to the (deciding official). The deciding official will receive your oral reply, or will designate an official or officials to receive it. If you do not understand the above reasons why your indefinite suspension is proposed, contact me or the Human Resources Management Office (give location and phone number) for further explanation.
6. The final decision to effect the action proposed has not been made. The (deciding official), who will make the final decision, will give full and Impartial consideration to your reply, If a reply is submitted.
7. If it is the decision of the (deciding official) that you be suspended indefinitely, your suspension will be effective not less than 7 calendar days from the date of your receipt of this notice.
8. You will be given a written decision as soon as possible after your reply has had full consideration, or after the close of business on the date mentioned in paragraph 5 above, if you do not reply.
9. You will be retained in a non-duty status with pay during the period of advance notice.

(Signature of division or service chief or
higher level official)

FOR OFFICIAL USE ONLY

FIGURE 6

SAMPLE DECISION - INDEFINITE SUSPENSION

FOR OFFICIAL USE ONLY

TO: (Name of Employee)
(Organization Element)
(VA Office or Field Facility)
(Street Address (when needed))
(City, State, and ZIP Code)

SUBJ: Indefinite Suspension

1. In connection with the letter of (date), in which you were given advance notice of your proposed indefinite suspension, a decision has been made to suspend you indefinitely pending (investigation of probable criminal conduct on your part) effective (date). Should subsequent administrative determination so warrant, a proposal may be made to remove you while you are in an indefinite suspension status.

2. This indefinite suspension is based on the following reasons:

The reason(s) as stated in the notice of proposed indefinite suspension is (are) sustained.

3. In reaching this decision, your written reply has been carefully considered along with all of the evidence developed.

4. (See app. B, for sample wording on employee appeal rights.)

5. A further explanation of your appeal rights may be obtained by consulting the Human Resources Management Office.

6. Notice of any other matter required by applicable Labor-Management Relations Agreement should be included.

(Signature of facility director or
comparable or higher level official)

Enclosure

FOR OFFICIAL USE ONLY

FIGURE 7

APPENDIX B. GRIEVANCE AND APPEAL RIGHTS

1. This appendix explains the grievance and appeal rights of employees in VA, under the provisions of chapters 752 and 771 of this manual, and parts 752 and 1201 of the Civil Service regulations in 5 CFR. The language used in this appendix as well as the sample letters in appendix A should be followed very closely to assure that employees are informed of their proper grievance and appeal rights.
2. This appendix does not explain any grievance rights under a negotiated grievance procedure. Such information should be obtained from the pertinent negotiated Labor Management agreement.

**APPEAL RIGHTS, REMOVALS, SUSPENSIONS FOR MORE THAN
14 CALENDAR DAYS, REDUCTIONS IN GRADE OR PAY**

3. Include:

If the employee:

Is covered by Section 752.401 of the OPM regulations and a negotiated grievance procedure.

In Notice of Final Decision:

Paragraph 3. You are entitled to appeal this action to the Merit Systems Protection Board (MSPB), or under the negotiated grievance procedure, but not both. You shall be deemed to have exercised your option to appeal this action to the MSPB (give address of appropriate office), or under the negotiated grievance procedure at such time as you timely initiate action to appeal to the Board or timely file a grievance in writing under the negotiated grievance procedure. If you elect to file a grievance under the negotiated grievance procedure, you will be entitled to union representation as provided for in the negotiated agreement.

Paragraph 4. If you appeal to the MSPB, your appeal must be in writing and must be filed with the Board no later than 30 calendar days after the effective date of this action. Any appeal to the Board must be filed either by mail or in person. Copies of the Board's appeal form and regulations are enclosed. You may be represented by an attorney or other representative of your choice.

**REMOVALS, SUSPENSIONS FOR MORE THAN 14 CALENDAR
DAYS, REDUCTIONS IN GRADE OR PAY (Continued)**

If the employee:

Is covered by Section 752.401 of the OPM Regulations and a negotiated grievance procedure.

In Notice of Final Decision:

Paragraph *5. If you believe that this personnel action is based on discrimination because of your race, color, religion, sex, national origin, age, or disability, you may file a complaint of discrimination with VA in accordance with EEO discrimination complaint procedures, or you may raise the Issue of discrimination in connection with your appeal to the Merit Systems Protection Board, (or in connection with a grievance under the negotiated grievance procedure) **, as previously described. Whichever is filed first (i.e., the discrimination complaint, appeal to the Board, or grievance) shall be considered an election by you to proceed in that manner.

Paragraph *6. Should you elect to file a complaint of discrimination with VA, your complaint will be processed in accordance with EEOC regulations at 29 CFR 1614. If you elect to file a complaint of discrimination, you may do so only after contacting an agency EEO Counselor who will attempt to informally resolve the matter. You must contact the counselor within 45 calendar days of the effective date of this personnel action. A complaint is deemed filed on the date it is received if delivered to an appropriate agency official, or on the date postmarked if addressed to an appropriate agency official designated to receive complaints,

**REMOVALS, SUSPENSIONS FOR MORE THAN 14 CALENDAR DAYS,
REDUCTIONS IN GRADE OR PAY (Continued)**

*Paragraphs 5 and 6 should only be used If allegations of discrimination have been raised by the employee.

**This statement should only be included when the negotiated grievance procedure allows complaint of discrimination to be raised in connection with a grievance,

If the employee:

Is a non-preference eligible who completed 1 year, but less than 2 years, of current continuous employment in a position outside the competitive service.

In Notice of Final Decision:

Paragraph 3. You have the right to appeal this action to (cite the appropriate decision official. See MP-5, pt. 1, ch. 771, for discussion of decision officials) at any time after you receive this decision but not later than 15 calendar days after the effective date of this action. The appeal must be in writing and set forth the specific reasons, facts, and circumstances which make you believe that the action taken was unwarranted.

Paragraph 4. In an appeal, you have the right to a hearing before an examiner under the provisions of MP-5, part 1, chapter 771. To obtain a hearing, you must request it in writing in your appeal. If you do not indicate in writing that you want a hearing, your case will be decided on the basis of the record. At the hearing, if one is held, you may be represented by a person of your choice and you may present evidence and witnesses who are willing to testify. The VA Human Resources Management Office (give location) will, upon your request, advise you further regarding the appointment of an examiner and the conduct of the hearing.

**GRIEVANCE AND APPEAL RIGHTS
SUSPENSIONS FOR 14 CALENDAR DAYS OR LESS**

If the employee:

Is covered by 5 CFR 771.104 (non-bargaining unit employees), or a negotiated grievance procedure.

In Notice of Final Decision

Paragraph 3. You may appeal this action under the (agency or negotiated) grievance. Your grievance must be submitted through your supervisor not later than (*number of days) after the effective date of the suspension.

Paragraph 4. A further explanation of your appeal rights may be obtained by consulting the VA Human Resources Management Office (give location).

*For employees covered under the VA administrative grievance procedure (ch. 771 of this manual), the grievance must be submitted no later than 15 days after the effective date of the action. For grievances under the negotiated grievance procedure, consult the appropriate negotiated Labor-Management agreement.

APPENDIX C. FIRM CHOICE, LAST CHANCE, AND ABEYANCE AGREEMENTS

1. This appendix is intended to provide guidance and sample language for the use and construction of these instruments in certain problem situations. Although they may be useful in various circumstances, these instruments are particularly helpful in dealing with situations requiring reasonable accommodation.
2. Case law pertaining to "firm choice," "last chance," and "abeyance" agreements is constantly evolving. When questions arise in this area, officials should contact their Regional counsel or general counsel as appropriate, or the Office of Human Resources Management (051) in VA Central Office.

SAMPLE FIRM CHOICE LETTER

The following sample paragraphs are intended as a guide to assist in the development of a letter tailored to the specific circumstances of each case. It may be used when an employee has claimed a substance abuse problem, or in cases when the employee has not claimed substance dependence, but the supervisor has a conduct or performance related reason to believe that an employee has a substance dependence, which may be causing an ongoing work related problem, and prior counseling and offers of assistance have failed to get the employee's attention. Letters of firm choice should be consistent with the provisions of any applicable collective bargaining agreements.

(Date)

(Name and Address of Employee)

SUBJ: Firm Choice Letter

1. Based on your past conduct (and/or performance), which has already been discussed with you (see attached letters of counseling), we have reason to believe that you have a substance abuse problem which warrants professional help.
2. For this reason, we are formally referring you to the VA Employee Assistance Program (EAP), so that an assessment and appropriate referral can be made for you. This offer of assistance is an opportunity for you to address your serious work-related problems and resolve them. The VA EAP is a confidential and free resource, and no record of details of your participation in the EAP will be placed in your Official Personnel Folder. Although the referral to the EAP and your participation in rehabilitation is voluntary, you should understand that this is to offer you a "firm choice" either seek and complete the prescribed treatment for your problem (while overcoming your (performance/conduct/leave) deficiencies) or accept the consequences of your misconduct. In this regard we are giving you the opportunity to seek, and successfully complete, (an inpatient and/or outpatient) substance abuse program.
3. You have (number) calendar days from receipt of this letter to enroll yourself in (an inpatient or outpatient) program for this purpose. You should work with your EAP counselor to determine the available programs and which would best suit your needs. Whether or not you elect to use the VA EAP, within this (number) day period you must provide documentation regarding the program requirements prior to entry, including the time which will be required for participation and any leave which you will request, so that (appropriate official) can determine whether your participation in the program can be approved. If (appropriate official) approves your participation in the program, you will be granted appropriate leave (annual, sick, or leave without pay) provided you have properly requested such leave in advance.

SAMPLE FIRM CHOICE LETTER (Continued)

4. You must also sign the attached release of information and return it to (appropriate official). A release of information is needed so that (appropriate official) can contact your counselor to discuss your enrollment, and your continued participation in the program.

Note to manager. If the employee is uncomfortable with signing a release, you may stipulate in the release that the only information to be given the supervisor is that the employee is complying with the program requirements. Generally, accommodation should not be denied solely because an employee refuses to sign a release form.

If you require additional information on what programs are available, you should contact the EAP office at this facility (provide name of contact and telephone number). Failure to provide the requested documentation or failure to enroll in a program will be regarded as evidence that you did not successfully complete a rehabilitation program.

Note to manager.- If on action is being held in abeyance, use the following: This will lead us to impose the action being held in abeyance. Should your misconduct and/or performance problems continue it will ultimately result in your being removed from VA. If an action has been Issued in conjunction with the firm choice, use the following: Should your misconduct and/or performance problems continue it will ultimately result in your being removed from VA.

5. During the time you are enrolled in a Program, you must furnish acceptable documentation concerning your progress at regular intervals (for example every 2 weeks). If it is suspected that you are not maintaining sobriety, or are not participating in the program, you will be referred to employee health, or your program counselor, as appropriate, for examination, and the results of this examination will be furnished to (appropriate official). Failure to provide the requested documentation will be regarded as evidence that you did not successfully complete a rehabilitation program.

Note to manager. If an action is being held in abeyance use the following: This will lead us to Impose the action being held in abeyance. Should your misconduct and/or performance problems continue it will ultimately result in your being removed from VA. If on action has been Issued in conjunction with the firm choice, use the following: Should your misconduct and/o performance problems continue, it will ultimately result in your being removed from VA.

6. You must furnish acceptable documentation that you have successfully completed this program within 10 days of the completion of such program. Failure to provide the requested documentation will be regarded as evidence that you did not successfully complete a rehabilitation program.

SAMPLE FIRM CHOICE LETTER (Continued)

Note to manager.- If on action is being held in abeyance use the following: This will lead us to impose the action being held in abeyance. Should your misconduct and /or performance problems continue it will ultimately result in your being removed from VA. If an action has been issued in conjunction with the firm choice, use the following: Should your misconduct and/or performance problems continue it will ultimately result in your being removed from VA.

Note to manager.- If there Is a decision to remove the employee being held in abeyance, use the following paragraphs:

7. For a period of 6 months (time period may vary) after successful completion of a rehabilitation program, you will be required to maintain yourself in a manner reflecting credit upon VA. This includes maintaining satisfactory attendance, performance, and conduct.

SAMPLE FIRM CHOICE LETTER (Continued)
Decision to Remove

Note to manager: *If time and attendance problems have been an issue, use the following: in addition, you must request all leave in advance, or support every unscheduled absence by acceptable documentation establishing an emergency situation as a condition for considering whether or not to approve leave for the period in question. Medical documentation must include a complete diagnosis which establishes that you could not work for the period in question.*

Failure to maintain yourself in a manner reflecting credit upon VA will be regarded as evidence that you are not successfully rehabilitated and will lead us to impose the removal action being held in abeyance.

8. Upon successful completion of all the above requirements of your rehabilitation program, the removal action against you being held in abeyance will be (reduced/canceled), You will be expected to continue to maintain yourself in a manner reflecting credit upon VA.

9. I appreciate your difficulties and I am not unsympathetic to your needs. I sincerely hope you will prevail in your rehabilitative efforts.

Signature of Appropriate Official

SAMPLE FIRM CHOICE LETRER (Continued)

Decision Less Than Removal

Note to manager. *If there is a decision less than removal being held in abeyance, or on action has been issued in conjunction with the firm choice, use the following paragraphs:*

7. For a period of 6 months (time period may vary) after successful completion of a rehabilitation program, you will be required to maintain yourself in a manner reflecting credit upon VA. This means there will be no more instances of problems of any type related to substance abuse, and also includes maintaining satisfactory attendance, performance, and conduct. Failure to maintain yourself in a manner reflecting credit upon VA will be regarded as evidence that you are not successfully rehabilitated.

Note to manager.- *If on action Is being held in abeyance use the following: This will lead us to impose the action being held in abeyance. Should your misconduct and/or performance problems continue it will ultimately result in your being removed from VA. If on action has been issued in conjunction with the firm choice, use the following: Should your misconduct and/or performance problems continue it will ultimately result in your being removed from VA.*

8. Upon successful completion of all the above requirements of your rehabilitation program, you will be expected to continue to maintain yourself in a manner reflecting credit upon VA.

Note to manager.- If an action Is being held in abeyance use the following: The (action) against you being held in abeyance will be reduced/canceled.

9. I appreciate your difficulties and I am not unsympathetic to your needs. I sincerely hope you will prevail in your rehabilitative efforts.

Signature of Appropriate Official

LAST CHANCE AND ABEYANCE AGREEMENTS

The following guidance was published by the Office of Personnel Management regarding "Last Chance" and "Abeyance Agreements" in situations requiring reasonable accommodation. Some minor changes have been made to reflect current case precedent.

SAMPLE INSTRUMENTS

Approach 1:

Agency proposes removal, but makes no decision on that proposal. Instead, the agency letter informs the employee that it is holding its decision in abeyance.

Situation: In response to the proposal to remove, the employee informed the agency that he was an alcoholic, and that he had just begun participating in the in-patient rehabilitation program to which the agency employee assistance counselors had referred him.

Agreement Provisions: The abeyance letter read in relevant part: "management agrees to afford the employee an opportunity to become a productive and dependable employee.

Employee must participate fully in the (specific) alcohol rehabilitation program, including missing no more than one of the follow-up meetings. Employee must attend two agency Alcohol Anonymous meetings per week.

For a period of 6 months after hospitalization, the employee will be required to show fully satisfactory attendance and performance. Every unscheduled absence must be supported by acceptable documentation establishing an emergency situation. Medical documentation must include a complete diagnosis, which establishes that the employee could not work.

Failure to comply with the above will constitute just cause for proceeding with the proposed action.

The abeyance letter was signed by the decision official, and did not require the employee's agreement.

LAST CHANCE AND ABEYANCE AGREEMENTS (Continued)

Outcome: The employee stopped going to the follow-up rehabilitation meetings, and the counselors so informed the agency. When the employee also had two unscheduled, unsupported absences, the agency invoked the agreement. Since the action had been held in abeyance before a decision was made, the agency had to issue a final decision on the charges in the original proposed action. In its decision letter, the agency first cited failure to participate in rehabilitation and the two instances of unsupported, unscheduled absence as violations of the abeyance agreement. Based on these violations, the agency explained that it was proceeding with the proposed action. The agency then assessed the evidence on the original charges, sustained them, decided to remove, and notified the employee that he would be removed in 1 week.

Approach 2:

Agency issues decision to remove, but holds Implementation of decision in abeyance.

Situation: Although the agency had referred the employee to alcohol treatment twice before, it wasn't until the employee received a notice of proposed removal for over 80 hours of AWOL that he admitted that he was an alcoholic and requested reasonable accommodation. The agency's decision letter sustained the charges, found removal warranted, and decided to remove. However, it also said that the agency had decided to hold the removal action in abeyance under specific conditions.

Agreement Provisions: The abeyance letter read in relevant part: "It is my decision that you should be removed from your position, but that this removal be held in abeyance for I year from the date you receive this letter, subject to the following: You have no further absences charged to AWOL; you submit documentation of successful completion of the (agency) Employee Assistance Program and the Kaiser Alcohol Abuse Program; your sick leave usage remains under the installation goal; and, your performance is at least fully successful. If all the foregoing criteria are met, the action will be canceled at the end of the 1 year period. Failure to meet any one of these criteria during the I year period will result in your immediate removal."

The letter was signed by the decision official and did not require the agreement of the employee.

LAST CHANCE AND ABEYANCE AGREEMENTS (Continued)

Outcome: Later, the agency decided that the employee had violated the terms of the agreement and reinstated the action. The decision letter described the specific violations: "On (date), you reported for work at 9:25. You claimed to have forgotten to set your alarm clock. You were charged with 1.5 hours of AWOL. On (date), you did not call in until 12:44. You claimed you could not call earlier because you had no change. You were charged with 4.25 hours of AWOL." (The agency also knew, but did not state in the letter, that the employee had stopped regular participation in the alcohol rehabilitation program.) "It is my decision that you have violated the terms of our agreement and, as such, you will be removed, effective (date)."

Approach 3:

Employee's removal has been effected, and the action is being appealed. The agency and the appellant reached an agreement to give him one last chance.

Situation: The employee was removed for being AWOL and being intoxicated on duty. While preparing for the hearing before MSPB, the appellant informed the agency that he was successfully participating in a rehabilitation program and requested one last chance. While clearly not required to do so, the agency agreed under certain conditions which the agency believed gave it a quid pro quo.

Agreement Provisions: The last chance agreement read in relevant part: "in consideration for reinstatement to the position of (specify position) for a 1 year period, (employee) agrees to the following:

- to participate in (specific) alcohol rehabilitation program.
- to maintain satisfactory punctuality, attendance, and good work habits."

"Should (employee) fail to participate in the rehabilitation program, or should his attendance and work habits become unsatisfactory during the 1 year period, the removal will be reinstated. One incident of AWOL or of being intoxicated on duty will be cause for reinstating the removal."

"Appeal rights to the Merit Systems Protection Board, and grievance-arbitration procedures are waived during this 1 year period on any disciplinary action against (employee)."

LAST CHANCE AND ABEYANCE AGREEMENTS (Continued)

"I clearly understand the last chance opportunity agreement, and fully agree with the terms of the settlement. I know and understand that I have appeal rights to the MSPB. With this agreement, I waive all appeal rights regarding my removal, which was effective (date), to the MSPB, grievance-arbitration, and the EEOC."

The agreement was signed by the employee, employee representative, supervisor, and two witnesses.

Outcome: Two months later appellant was AWOL for 2 days. His supervisors went to his home and found him intoxicated. The agency removed him the next day. MSPB ruled that the agreement had been properly invoked, that the appellant had waived his appeal rights to the MSPB and thus dismissed the case.

**APPENDIX D. TABLE OF EXAMPLES OF OFFENSES AND PENALTIES
INSTRUCTIONS FOR USE OF TABLE**

1. The range of penalties indicated in this table is to be used as a guide in administering discipline to help assure that like disciplinary action is taken for like offense.

2. The suspension penalties listed in the table are applicable to workdays only.

(Caution: In Title 6, U.S. Code, Chapter 75, "Suspended for More than 14 days" is interpreted to express calendar days

3. In using this table, consideration will be given to the following:

a. The table is designed to be sufficiently broad to include most types of offenses, but is not intended to be an exhaustive listing of all offenses. For other offenses, appropriate penalties may be prescribed by disciplinary officials for application within their jurisdiction, consistent with the range of penalties for comparable offenses listed in the table.

b. This guide does not cover all offenses for which disciplinary penalties are expressly provided by law or Civil Service regulation.

c. Offenses need not be identical in order to support progressively more severe disciplinary/ adverse action against an employee. For example, an employee who has received an admonishment for AWOL can receive a reprimand for sleeping on duty, and possibly be suspended or removed for a third offense unrelated to the two previous infractions.

d. When an employee has committed a combination or series of offenses, a greater penalty than is listed for a single offense is appropriate.

e. Where appropriate, demotion may be used in place of removal as provided in this chapter, except for the offense described in item 27 of the table.

f. Disciplinary penalties will generally fall between the ranges indicated in the guide, but in unusual circumstances greater or lesser penalties may be imposed. In determining disciplinary action to be taken in a specific case, the following factors that will be considered as cited in Douglas v. VA, 5M.S.P.R.280(1981). Remember that any of the Douglas factors may be either mitigating or aggravating. Each relevant factor must be addressed.

(1) The nature and seriousness of the offense, and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;

(2) The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

**TABLE OF EXAMPLES OF OFFENSES AND PENALTIES
INSTRUCTIONS FOR USE OF TABLE (Continued)**

- (3) The employee's past disciplinary record;
 - (4) The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
 - (5) The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon the supervisor's confidence in the employee's ability to perform assigned duties;
 - (6) Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
 - (7) Consistency of the penalty with any applicable agency -table of penalties;
 - (8) The notoriety of the offense or its impact upon the reputation of the agency;
 - (9) The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
 - (10) Potential for the employee's rehabilitation;
 - (11) Mitigating circumstances surrounding the offense such as unusual job tension, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
 - (12) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.
- g. Removal action will be taken whenever required by law or regulation or whenever warranted by the facts in the individual case. Normally, progressively more severe penalties will be administered before removal action is initiated, unless the offense is so serious that it warrants removal action. The severity of the penalty will be that which is required in order to correct the attitude or conduct of the employee or to correct the situation.
- h. Although oral or written counselings of employees are not considered disciplinary actions, such counselings may be considered when assessing the appropriate penalty for a particular offense.
- i. The "Douglas" factors are not applicable in those instances where a specific penalty (e.g., 30 day suspension for misuse of a Government vehicle) is required by statute.

**APPENDIX D. TABLE OF EXAMPLES OF OFFENSES AND PENALTIES
RANGE OF PENALTIES FOR STATED OFFENSES
(admonishments - reprimands - suspensions - removals)**

NOTE:..... 'Days' specified in this table refer to suspension.

NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum	Minimum	Minimum
1. Unexcused tardiness.	Admonishment Reprimand	Reprimand 5 days	Reprimand 5 days
2. Unexcused or unauthorized absence.	Admonishment Reprimand	Reprimand 10 days	10 days Removal
3. Leaving job to which assigned or VA premises, during working hours, without proper permission	Admonishment Reprimand	5 days Reprimand	10 days Removal
4. Loafing, willful idleness, or waste of time.	Admonishment Reprimand	Reprimand 10 days	10 days Removal
5. Careless or negligent workmanship resulting in waste or delay.	Admonishment Reprimand	Reprimand 10 days	10 days Removal
6. Violating traffic regulations or reckless driving on VA premises; or improper operation of a motor vehicle.	Admonishment Reprimand	Reprimand Removal	10 days Removal
7. Failure to observe precaution for personal safety, posted rules, signs, written or oral safety instructions, or to use protective clothing or equipment.	Admonishment 10 days	Reprimand Removal	10 days Removal
8. Smoking in unauthorized places or carrying of matches in explosive areas	Admonishment	Reprimand 10 days	10 days Removal
9. Endangering the safety of or causing injury to anyone on VA premises through carelessness or negligence.	Admonishment Removal	10 days Removal	Removal
10. Failure to report personal injury or accident.	Admonishment Reprimand	Reprimand 10 days	5 days 15 days
11. Failure to safeguard confidential matter.	Admonishment Reprimand	Reprimand 10 days	10 days Removal
12. Deliberate failure or unreasonable delay in carrying out instructions.	Admonishment Reprimand	3 days 10 days	10 days Removal

RANGE OF PENALTIES FOR STATED OFFENSES (Continued)
(admonishments - reprimands - suspensions - removals)

NOTE: "Days" specified in this table refer to suspension.

NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum	Minimum	Minimum
13. Sleeping on duty. a. Where safety of patients, beneficiaries, members, employees or property is not endangered.	Admonishment Reprimand	Reprimand 10 days	10 days Removal
b. Where safety of patients, beneficiaries, members, employees, or property may be endangered.	5 days Removal	Removal	
14. Abuse of patients or beneficiaries	Reprimand Removal	10 days Removal	Removal
15. Fighting, threatening, attempting or inflicting bodily injury to another; engaging in dangerous horseplay. (Penalty depends on such factors as provocation, extent of any injuries, and whether actions were defensive or offensive in nature)	Removal Reprimand	10 days Removal	Removal
16. Disrespectful conduct, use of insulting, abusive, or obscene language to or about other personnel, patients, or visitors.	Reprimand Removal	10 days Removal	Removal
17. Deliberate refusal to carry out any proper order from, or insolent, abusive, or obscene language toward immediate or other supervisor having responsibility for the work of the employee; willful resistance to same	Reprimand Removal	10 days Removal	Removal
18. Offenses related to intoxicants. Actions involving these offenses should be reviewed to ensure the requirements of drug and alcohol abuse program are met. a. Alcohol-related:			
(1) Unauthorized possession of alcoholic beverages while on VA premises or in duty status.	Reprimand 5 days	10 days Removal	15 days Removal

RANGE OF PENALTIES FOR STATED OFFENSES (Continued)
(admonishments - reprimands - suspensions - removals)

NOTE: "Days" specified in this table refer to suspension.

NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum	Minimum	Minimum
18.b. (Continued)			
(2) Unauthorized use of alcoholic beverages while on VA premises or in duty status.	Reprimand 10 days	15 days Removal	Removal
(3) Reporting to or being on duty while under the influence of alcohol.	Reprimand 10 days	15 days Removal	Removal
(4) Sale or transfer of an alcoholic beverage while on VA premises or in a duty status or while any person involved is in a duty status.	10 days Removal	Removal	
b. Drug-related:			
(1) Unauthorized possession of an illegal drug or controlled substance while on VA premises or in a duty status.	5 days 10 days	15 days Removal	Removal
(2) Unauthorized use of a drug or controlled substance while on VA premises or in a duty status.	10 days Removal	15 days Removal	Removal
(3) Reporting to or being on duty while under the influence of a drug or controlled substance.	15 days Removal	Removal	
(4) Sale or transfer of a drug or controlled substance while on VA premises or in a duty status or while any person involved is in a duty status.	15 days Removal	Removal	
(5) Refusal to take drug test, as required	Admonishment Removal	15 days Removal	Removal

RANGE OF PENALTIES FOR STATED OFFENSES (Continued)
(admonishments - reprimands - suspensions - removals)

NOTE: "Days" specified in this table refer to suspension.

NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum	Minimum	Minimum
19. Gambling, unlawful betting; on VA premises.	Reprimand 10 days	10 days Removal	Removal
20. Promotion of gambling on VA premises.	Reprimand 10 days	10 days Removal	Removal
21. Indebtedness-lack of good faith in paying just financial obligations; such as failure without good cause to make or live up to arrangements to pay a debt that the employee admits he owes or that is supported by court judgment, or that represents a tax or other financial obligation to the U.S. Government or to State and local government.	Admonishment	Admonishment Reprimand	Reprimand Removal
22. Actual or attempted theft of Government property, or of personal property. on VA premises.	Reprimand Removal	10 days Removal	Removal
23. Making false or unfounded statements, which are slanderous or defamatory, about other VA personnel or officials.	Reprimand Removal	10 days Removal	Removal
24. Falsifying attendance record for self or another employee.	Reprimand Removal	10 days Removal	Removal
25. Intentional falsification, misstatement, or concealment of material fact in connection with employment or any investigation, inquiry or proper proceeding; refusal to cooperate in same; or willfully forgoing or falsifying official Government records or documents	Reprimand Removal	10 days Removal	Removal

RANGE OF PENALTIES FOR STATED OFFENSES (Continued)
(admonishments - reprimands - suspensions - removals)

NOTE: "Days" specified in this table refer to suspension.

NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum	Minimum	Minimum
<p>26. Loss of, damage to, or unauthorized use of Government property:</p> <p>a. Through carelessness or negligence</p> <p>b. Through maliciousness or intent</p> <p>NOTE: For willful use or authorization of the use of any Government vehicle for other than official purposes, the prescribed penalty is suspension for not less than 30 days or removal (31 U.S.C. 1349(b); see number 49.</p>	<p>Admonishment 15 days</p> <p>Reprimand Removal</p>	<p>10 days Removal</p> <p>10 days Removal</p>	<p>Removal</p> <p>Removal</p>
<p>27. Owning any interest in, or receiving any, wages, salary dividends, profits, gratuities, or services from any educational institution operated for profit in which an eligible veteran, or person, is pursuing a course of education or training under 38 U.S.C. 34 and 35 where it is determined that detriment will result to the United States or to eligible veterans, or persons, by reason or such interest or connection</p>	<p>Removal</p>		
<p>28. Participation in any type of outside activities of relationships with contractors lenders, builders, or others engaged in business with VA or relationships with those seeking contracts, which would be contrary to the best interests of VA and the veterans it serves. Penalty action will be determined on the basis of whether the activities, or relationships, might result in a conflict between the private interest of the employee and his/her duty and obligation to VA, or tend to create in the minds of others a suspicion of prejudice or favoritism that would be of embarrassment to VA.</p>	<p>Admonishment Removal</p>	<p>10 days Removal</p>	<p>Removal</p>

RANGE OF PENALTIES FOR STATED OFFENSES (Continued)
(admonishments - reprimands - suspensions - removals)

NOTE: "Days" specified in this table refer to suspension.

NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum	Minimum	Minimum
29. Except as specifically authorized, disclosing or using directly or indirectly information obtained as a result of employment in VA, which is of a confidential nature or which represents a matter of trust; or any other information so obtained of such character that its disclosure or use would be contrary to the best interests of the Government, VA, or the veterans being served by it.	Reprimand Removal	Removal	
30. Borrowing from, or lending money to, any beneficiary or claimant of VA; or borrowing from, or lending money to, another VA employee (or non-VA employee) for the purpose of monetary gain while on duty or on VA property.	Reprimand Removal	Removal	
31. Soliciting contributions for, or otherwise promoting, on premises occupied by VA, any national or local welfare or other type of campaign which has not had appropriate VA endorsement	Reprimand Removal	10 days Removal	Removal
32. Selling tickets, stocks, articles, or commodities or services on VA premises. This prohibition is not to be construed as prohibiting employees from engaging in bonafide activities on premises occupied by VA or organized employee union, group, organization, or association, as provided in other chapter of this manual.	Reprimand Removal	10 days Removal	Removal
33. Accepting gifts or gratuities (whether in the form of goods, money, services, purchases at discount, entertainment, or similar favors) from claimants or beneficiaries of the VA, or individuals or firms doing business with or having contractual relations with the VA.	Reprimand Removal	Removal	

RANGE OF PENALTIES FOR STATED OFFENSES (Continued)
(admonishments - reprimands - suspensions - removals)

NOTE: "Days" specified in this table refer to suspension.

NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum	Minimum	Minimum
34. Violation of the Privacy Act.	Reprimand 10 days	10 days Removal	Removal
35. Prohibited personnel practice (Reference: U.S.C. 2302.)	Reprimand Removal	10 days Removal	Removal
36. Participating in a strike, work stoppage, sick out, slowdown, or other job action.	Reprimand	Removal	Removal
37. Sexual harassment.	Reprimand Removal	5 days Removal	10 days Removal
Offenses Related to Supervisory/Managerial Observance of Employee Rights:			
38. Discrimination based on race, color, sex, religion, national origin, age, marital status, political affiliation, or disability.	Reprimand Removal	5 days Removal	10 days Removal
39. Interference with an employee's exercise of, or reprisal against an employee for exercising, a right to grieve, appeal or file a complaint through established procedures.	Reprimand Removal	5 days Removal	Removal
40. Reprisal against an employee for providing information to an Office of Inspector General (or equivalent) or Office of Special Counsel, or to an EEO investigator, or for testifying in an official proceeding.	10 days Removal	Removal	
41. Reprisal against an employee for exercising a right provided under 5 U.S.C. 71(Federal Labor Management Relations Statute).	Reprimand Removal	5 days Removal	10 days Removal
42. Violation of an employee's constitutional rights (i.e., freedom of speech, association, religion).	Reprimand Removal	5 days Removal	10 days Removal

RANGE OF PENALTIES FOR STATED OFFENSES (Continued)
(admonishments - reprimands - suspensions - removals)

NOTE: "Days" specified in this table refer to suspension.

NATURE OF OFFENSE	1ST OFFENSE	2ND OFFENSE	3RD OFFENSE
	Minimum	Minimum	Minimum
Offenses Prescribed in Statute:			
43. Finding by MSPB of refusal to comply with MSPB order or of violation of statute causing issuance of Special Counsel complaint ((5 U.S.C. 1204(a)(2) and 1212(a)). NOTE: Penalty may need to be coordinated with Office of Special Counsel.	Reprimand Removal	Reprimand Removal	Reprimand Removal
44. Directing, expecting, or rendering services not covered by appropriations (5 U.S.C. 3103).	Removal		
45. Prohibited Political Activity:*			
a. Violation of prohibition against the solicitation of political contributions (5 U.S.C. 7323).	Removal		
b. Violation of prohibition against influencing elections (5 U.S.C. 7324).	30 days Removal	Removal	
46. Failure to deposit into the Treasury money accruing from lapsed salaries or from unused appropriations for salaries (5U.S.C. 5501).	Removal		
47. Soliciting contributions for a gift for a superior; making a donation as a gift to a superior; accepting a gift from an employee receiving less pay (5 U.S.C. 735 1).	Reprimand Removal	10 days Removal	Removal
48. Action against national security (5 U.S.C. 7532).	30 days Removal	Removal	
49. Willfully using or authorizing the use of a government passenger motor vehicle or aircraft for other than official purposes (31 U.S.C. 1349(b)). NOTE: 30 days for this offense means calendar days.	30 days Removal	Removal	
50. Mutilating or destroying a public record (1 8 U.S.C. 207 1).	Removal		

*Actions based on Hatch Act violations will be initiated by the Office of Special Counsel.